ORGANIZATION AND PROCEDURE

OF

SHARI'A COURTS IN NORTHERN NIGERIA

by

S U L A I M A N K U M O

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ABSTRACT

This thesis deals with Islamic Law of Civil Procedure, according to the Mālikī School, which applies in those "area courts" in the northern states of Nigeria whose "native law" is the Shari'a. These courts have been called in the thesis the Shari'a courts of Northern Nigeria.

The thesis is divided into six chapters, with the conclusion as the seventh chapter.

Chapter I is an introductory chapter which gives a historical sketch, the constitutional background and the framework of the legal system within which the Shari'a courts exist and function. Chapter II deals with the arena of the courts - their establishment, staff, sessions and the question of venue. Parties to litigation are discussed in Chapter III while Chapter IV considers pleadings. In Chapter V the actual trial procedure and the mode of proof are considered and the issue of conflict between the Shari'a rules on these on the one hand and the practical needs of modern litigation on the other is also tackled. Chapter VI deals with general matters of civil litigation : sulh, arbitration, execution of judgements, injuctions, time bar, costs, and appeals.

In the thesis generally, both the Shari'a rules and the statutory enactments governing the topics have been considered and in the conclusion the possibility of codifying the Shari'a rules and integrating them within a unified code of civil procedure governing all native courts has been considered and my conclusion is that this is both possible and desirable.

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CHAPTER I

ORGANISATION AND PROCEDURE OF SHARI'A COURTS IN NORTHERN NIGERIA

Aim and Purpose

The aim of the thesis is the study of the Shari'a courts and their "civil procedure" in Northern Nigeria.

The importance of the Shari'a law in Northern Nigeria has always been recognized; and the importance of the Shari'a courts which apply the Shari'a has never been doubted either : the Shari'a law governs the legal relations of the majority of people in Northern Nigeria and the Shari'a courts form part of the fabric of Northern Nigerian society and its life style.[1] They handle about seventy per cent of the volume of litigation (both civil and criminal),[2] and in the majority of civil cases few appeals go outside the ambit of the application of the Shari'a.[3]

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1. See for example The Minutes of the Shari'a Court of Appeal Justices Conference held in December 1971, pp. 1-2, where some statistics are given.

2. Ibid, p. 2.

3. See Chapter I, part 2, below.

It is perhaps because of their importance and their antiquity (the institution has been in existence for over one and a half centuries now), as well as the high esteem in which they have always been held that they have survived to the present day. Throughout the present century no Government of Northern Nigeria has ever seriously considered abolishing them or even diminishing their power.[4] A number of reforms and changes have, in recent years, been introduced in the jurisdiction, administration and control of these courts (as well as other "native courts" in Northern Nigeria). The reforms and changes have had a profound effect on the type of law they apply and their jurisdiction and powers in criminal matters. As a result of the reforms, the Shari'a is no longer applied in criminal matters; but in civil matters the dominance of the Shari'a remains undiminished.[5]

Although the reforms and changes were introduced partly in response to the demands of critics of the "native courts", there is still a good deal of dissatisfaction with, and criticism of, the methods and procedures of the courts.

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4. Except in 1966 when the new Military Administration in Nigeria considered the possibility of abolishing all native courts.

5. See Chapter I, Part 2, below.

For example in their criminal jurisdiction although they are bound to apply the new Penal Code, they are not bound by and do not apply the Criminal Procedure Code as a whole.[6] They are only bound by a few of its provisions and are only to be "generally guided" by the rest of the Code. And the same applies in the case of the Evidence Law.[7] As a result, the strict procedure followed by the Magistrates' courts and the High Court is not the procedure followed by the "native courts", and evidence that may be quite inadmissable in the High Court and the Magistrates' courts may be quite properly admitted and relied upon by the native courts. This, according to the critics, is an unconstitutional discrimination against a prisoner tried in the "native courts", since he is, in these courts, denied all the safeguards available in the High Court. Then again lawyers are not allowed in the "native courts",[8] which means that an accused person has been denied the right to be represented by a lawyer for the purpose of his defence in criminal proceedings.

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6. See s. 6 Penal Code Law, Laws of Northern Nigeria, 1963, and s. 386, Criminar Procedure Code, The C.P.C. Law, ibid.

7. See s. 2, Evidence Law, ibid.

8. See se. 31, Native Courts Law, ibid, and now s. 28(1) Area Courts Edict 1968, Laws of the North Eastern State of Nigeria and s. 28 (1) of the Area Courts Edict of the other Northern States.

On the civil side, the criticism is similar to that made of the criminal procedure. There exists a "Native Courts (Civil Procedure) Rules", made in pursuance of powers granted by the Native Courts Law.[9] The Rules apply to all "native courts",[10] but the Shari'a Courts in matters of trial procedure are to follow the Shari'a procedure.[11] The complaint here is that this introduces a good deal of uncertainty. First, although the Shari'a procedure exists, it is not in an accessible form. It is not, for example, in a Code to which anybody can refer, and even some of the "Alkalis", perhaps most of them, have scant knowledge of it.[12] Secondly, the alkalis who are learned in the Shari'a have an unfettered discretion to apply any one of a number of available opinions of the Shari'a authorities without any consistency in the way they follow the

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9. See S.75 Native Courts Law, Laws of Northern Nigeria, 1963, and now S.65, Area Courts Edicts, ibid.

10. Subject, before 1967, to certain restrictions; see below Chapter I, Part 2, p.

11. See Order 11 of the Native Courts (Civil Procedure) Rules 1960 and Order 11, Area Courts (Civil Procedure) Rules 1971.

12. See Minutes of the Shari'a Court of Appeal Justices Conference December 1971 where this point is mentioned. Alkalis are the judges in the Shari'a courts.

various differing opinions.[13] (It is true that the same criticism may be made of their application of the substantive Shari'a law itself; but the substantive Shari'a law is, in large measure, bound up with the procedure).

Now, in spite of all the criticism made of the courts, no study has so far been made of the Shari'a procedure which they are required to follow in civil matters. It is submitted that a study of the Shari'a "civil procedure", both in theory and in its practical application by the courts, is a necessary prerequisite for any meaningful reforms. Such a study will not only be informative, but it will also show what defects there are in the existing machinery of justice and how best to try to remedy them. It will also show ways and means of introducing reforms in the substantive law itself, especially in the area of family relations. There is little doubt that family law reform in Northern Nigeria is in urgent need today.[14]

This study has, therefore, been motivated both by the desire to explore a field of great academic interest which has hitherto been largely neglected (i.e. the Shari'a procedure), and by the desire to stimulate interest in law reform in the domain of the Shari'a in Northern Nigeria.

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13. In a discussion with the Grand Khadi of Northern Nigeria he admitted that his court would not feel bound to reverse the decision of a lower Shari'a court, provided it is based on some authority, no matter how weak.

14. This view is shared by the judges of the Shari'a Court of Appeal of Northern Nigeria.

Part 1.

Definitions : The only terms that need defining at this stage are (a) Northern Nigeria, and (b) Shari'a courts.

(a). Northern Nigeria.

Northern Nigeria has to be defined for the purposes of this thesis because, at the moment of writing, Northern Nigeria is no longer the politico-legal entity that it had, until recently, been.[15]

For the purposes of this thesis, Northern Nigeria covers an area of political geography and a period of political history in West Africa. As its history is of very little relevance here, it would suffice to divide it into two periods -

i. The 19th century period of the "Sokoto Califate" and the "Bornu Empire", and

ii. The 20th century period of the British and post-British Nigeria.

The Sokoto Califate was established in the early part of the 19th century by the Fulani under the leadership of Shehu Usman b. Fodi (hereinafter referred to as the Shehu). The aim of the founders of the Sokoto Caliphate was to establish a "Dār-el-Islām" in Hausaland out of the Kingdoms of Gobir and

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15. See the States (Creation and Transitional Provisions) Decree 1967, Laws of the Federal Republic of Nigeria, 1967.

other Hausa states in that part of West Africa.[16] To this end the Shehu received the allegiance (the bay'a) of his followers, the effect of which was to make him, constitutionally, the Amīrul Mūmineen. He, in turn, appointed some of his followers as amīrs (governors) of the various provinces of the country they were determined to make into Dār-el-Islām. (This was to be done by means of Jihād, wars waged under the leadership of the Shehu and his amīrs; the Shehu not taking an active part while the amīrs conducted their campaigns in the provinces). Within a relatively short time Dār-el-Islām was established, covering most of the Northern States of present-day Nigeria, as well as parts of the present-day Niger Republic, Cameroun Republic and a small part of the west of southern Nigeria, south of the River Niger. Sokoto was the spiritual and the political centre and capital of the Caliphate. It is therefore appropriate to call it "the Sokoto Caliphate."[16a]

The Sokoto Caliphate continued in existence as a single but quasi-federal entity from about 1804 until the British conquest of the territory in 1903. It did not owe allegiance

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16. See D. M. Last : The Sokoto Caliphate, Longmans, London, 1967, Chapter 3. H. A. S. Johnston, The Fulani Empire of Sokoto, London, 1967, Chapter 4.

16a. Ibid.

to the Ottoman Empire, although there was some official intercourse between them. This was very little, and mainly in the form of correspondence between Sokoto and the Ottoman Governor of Tripoli. The Shehu himself, and other constitutional theorists among the leadership, took the view that it was legitimate to have two Califas at the same time if the distance between their two territories justified having two Califas. In one of his books the Shehu stated that the appointment of the Amīrul Mūmineen (i.e. Califa) was obligatory on the people.[17] In other words, it was not just something that was right, but in those circumstances, it was wājib.

The Bornu Empire, on the other hand, was in existence much earlier than the Sokoto Califate, and had much closer links with the Ottoman provinces of Africa, though it, too, was never part of the Ottoman Empire. When the Sokoto Califate came into existence, it existed side by side with the Bornu Empire, neither recognizing the legitimacy of the other, and boundary and other disputes were occasionally settled by wars - despite their common allegiance to Islam.[18]

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17. See the Shehu's Wathīqat ahl-al-Sudān, translation by A. D. Bivar, Journal of African History, Vol. II, No. 2, 1961, pp. 235-243.

18. See H. A. S. Johnson, op.cit., Chapter 7.

The Bornu Empire covered most of present-day Bornu province in the North-Easter State of Nigeria; large parts of the present-day Chad Republic and parts of the Cameroun and Niger Republics of today.

When the British came in the early 20th century and donquered most of the territories of the two empires, they amalgamated them into one "Protectorate", with other parts of the territories under the British control south of the Rivers Niger and Benue. However, in due course these parts of the Sokoto and Bornu Empires that were now part of the "Colony and Protectorate of Nigeria" became the "Northern Provinces" of Nigeria, under a Lieutenant-Governor. They formed a quąsi-autonomous political entity. This state of affairs continued until 1954 when a federal constitution was formally introduced.[19] The new federal constitution divided Nigeria into three autonomous states called "Regions" - the Northern, Western and Eastern Regions. These states were also called Northern Nigeria, Western Nigeria, and Eastern Nigeria.

This constitutional arrangement for Nigeria continued throughout the rest of the British rule in Nigeria, and

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19. See Odumosu, The Nigerian Constitution : History and Development, London, 1963, Chapter 3.

when Nigeria became independent the only modification that was made was the creation of another state out of Western Nigeria. This was the Mid-West State.[20] Thus Northern Nigeria still remained a single entity, until May 1967, when the four-states federal structure of Nigeria was replaced by another federal structure of twelve states.[21] Six of the newly created twelve states were carved out of the former Northern Nigeria,[22] and they are still referred to as the six "northern states". They still maintain certain common services - notably the judiciary - and there is a body known as the "Interim Common Services Agency" in Kaduna, the capital of the former Northern Nigeria, which administers the common services.[23] Thus, for example, there is only one Chief Justice for all the six northern states - the Chief Justice of the former Nothern Nigeria. There is also only one Grand Khadi for all the six states, the Grand Khadi of the former Northern Nigeria. In

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20. The Mid-Western Region Act (No. 6 of 1962).

21. See the States (Creation and Transitional Provisions) Decree, 1967, Laws of the Federal Republic of Nigeria, 1967.

22. These are the North Eastern, North Western, North Central, Kano, Benue-Plateau and Kwara States.

23. See the Interim Common Services Agency Decree, 1968, Laws of Northern Nigeria and the Interim Administrative Council, 1967 and 1968.

addition to the common services, there is a great deal of uniformity in the legislative and administrative patterns of the six states: first, the Constitution of the former Northern Nigeria, with the modifications it suffered as a result of the military take-over, forms the Constitution of each of the six states - subject of course to amendments and changes by the states if, and as, they desire.[24] Secondly, the Northern Nigeria High Court Law is the High Court Law of each of the states;[25] and thirdly - and of greater relevance for the purpose of this thesis - the recently promulgated "Area Courts Edicts" (i.e. "native courts" legislation) by each of the six states are identical.[26] And this identity of enactments in the field of judicial administration (as well as the similarity of legislation in other fields) is likely to remain the trend for some time to come.[27]

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24. The States (Creation and Transitional Provisions) Decree, Laws of the Federal Republic of Nigeria, 1967, S.1 (5).

25. Ibid.

26. See the Area Courts Edict, 1967, of each of the six northern states.

27. Thus, the life of the I.C.S.A. is extended annually and the "Law Officers" of the States meet regularly in Kaduna to discuss all matters concerning law reform and legislation generally. See the Minutes of Sharia Court of Appeal Justices Conference, December 1971.

It is for the above reasons that the name "Northern Nigeria" is used in this thesis, even though it is politically incorrect. It is true that not every part of Northern Nigeria is under the sway of the Shari'a law,[28] but the fact that Shari'a Courts are found in all the states[29] and in most parts of each state justifies the blanket use of the name.

(b). Shari'a Courts

The Nigerian legal system, as it operates in Northern Nigeria, provides for a judiciary which has two branches of court systems. There is first the imported model, the English type of courts which administer the received English Law.[30] These are : the High Court, staffed by the Chief Justice, the Senior Puisne Judge and other Judges of the High Court; and the Magistrates and District Courts, staffed by Magistrates and District Judges of various grades. These courts are few

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28. Non-Shari'a native courts are found mainly in parts of Kwara and Benue-Plateau States.

29. There is a Division of the Shari'a Court of Appeal in each of the States.

30. See the High Court Law, Laws of Northern Nigeria, 1963, S.28; The District Courts Law, ibid, S.23.

in number and they deal with the more complex civil as well as criminal cases, usually involving elements foreign to the native society and native law. Such cases are, as a rule, governed by English law.[31]

Secondly, there are the courts which, until recently, were called the "native courts", and are now renamed the "Area Courts".[32] They are many and are staffed by various grades of Alkalis and other native court judges.[33] They have both civil and criminal jurisdictions, but their jurisdiction is largely confined to "natives" and in civil matters to cases governed by native law and custom.[34]

A very large number - indeed the majority of native courts - are presided over by Alakalis who are learned (or are

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31. See Chapter I, Part 2, below.

32. See the Area Courts Edict, No. 1 of 1967, Laws of the North-Eastern State of Nigeria, S.3 and the other States Edicts.

33. According to the available statistics, there are in the North Eastern State (see North-East State Gazette, 1968 Collection) for example, 141 Area Courts, of which 113 are what are here termed "Shari'a courts". Compare this number with 1 High Court and 5 Magistrates' courts of various grades. The available figures for Northern Nigeria as a whole show that there were, in 1966, 757 courts of the various grades. Of these, 339 were alkali courts (i.e. Shari'a courts). (Information obtained from the Registry of the High Court of Justice, Kaduna, compiled by Mr. W. Burnett, one-time Commissioner for Native Courts, Northern Nigeria. Material from this is hereafter referred to as Burnett Notes.)

34. See below, Chapter I, Part 2.

supposed to be learned) in Islamic Law. These are the Courts referred to in this thesis as the "Sharī'a Courts". They have been in existence in some organised form or other for over a century and a half.[35] The "native law and custom" that they are required to apply is the Sharī'a.[36]

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35. From the time of the Sokoto Califate. See the Shehu's Wathīqat op. cit.

36. Under the Native Courts Law, native law includes "Moslem Law" - see the Native Courts Law, Laws of Northern Nigeria, 1963, S.2. Also, the High Court Law, ibid, S.2.

The Nigerian Legal System

1. Constitutional Structure

Nigeria is a federation of twelve states with thirteen governments and legislative authorities.[37] Legislative power is shared between the Federal legislature and the State legislatures. The Federal legislature is a legislature of enumerated powers : it can only legislate in respect of certain enumerated subjects, while the State legislatures have the power to legislate in respect of everything else not specified as a Federal matter.[38]

The Federal Constitution contains a certain number of sections which cannot be legislatively infringed either by the Federal or the State legislatures. For example, the sections dealing with the "Fundamental Human Rights",[39] and those dealing with the Supreme Court of Nigeria, and the right

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37. The Federal Government and Federal legislature and the Governments and Legislatures of each of the twelve States of the Federal Republic.

38. See the Constitution of the Federal Republic of Nigeria, 1963, the Legislative Lists. At the moment these are in a state of flux. See f.n. 41 below.

39. Ibid, S.4. Now, needless to point out, a dead letter under the Military Régime.

of appeal to it in certain specified cases. These belong to the category of "entrenched" sections which may not be infringed; and they can only be amended or repealed by a special legislative procedure.[40]

Subject to the above, the Constitution provides, in the Schedules to the Constitution, two "Legislative Lists" - the "Exclusive" and the "Concurrent" lists. The first contains those subject-matters which are the exclusive preserve of the Federal Legislature, and State Legislatures have no power to legislate in those fields. They include : Foreign Affairs, Defence, Telecommunications, Companies, Banking, Exchange Control, Currency and Coinage, the Nigeria Police, etc. The "Concurrent" list, on the other hand, contains those subject-matters in respect of which both the Federal and the States Legislatures have power to legislate; but this is subject to the proviso that if there is a conflict between a State and a Federal legislation in any of the matters in the "Concurrent" list, the Federal legislation overrides the State legislation.[41] The list includes such matters as

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40. Ibid.

41. S.69, ibid.

Antiquities and Archives, the promotion of Tourism, Labour, Higher Education, etc.

The State Legislatures have what are known as the "Residual powers" : everything else not mentioned in the two Legislative Lists is within the power of the States to legislate on.[42] The most important power which the State Legislatures have is perhaps the power to make laws for the peace, order and good government of the State.[43] To this end various laws have been enacted by the States - for example laws on the judiciary, like the High Court Law.[44] However, the Constitutions of the States contain definite directives concerning the establishment of the High Courts and their judicial staff (see below).[45]

In considering the provisions of laws that regulate the judiciary and judicial organisation generally I shall confine myself to the provisions of the Constitution and Laws of the former Northern Region. This is because the provisions in the other Constitutions and Laws on the subject under consideration are substantially identical, and secondly because

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42. S.69 (5) ibid.

43. See, e.g., the Constitution of Northern Nigeria, Laws of Northern Nigeria, 1963, S.4.

44. N. N. H. L. 1963.

45. Chapter I, Part 2.

the Constitution and the Laws of the former Northern Region are (as pointed out above) still in force in each of the six northern States, subject to some amendments and additions.[46]

The Constitution (of the former Northern Region) provides that "there shall be a High Court for the Region", the judges of which are to be the Chief Justice of the Region and such number of other judges (not less than six) as may be prescribed by the Regional Legislature.[47] This provision means that it is a constitutional requirement that there must be a High Court for the Northern Region, and it is not within the discretion of the Regional Legislature to establish one or not to establish one, as it may wish.

The Legislature then passed the High Court Law, under which the "High Court of Justice of Northern Nigeria" was established, with a bench consisting of the Chief Justice, the Senior Puisne Judge (i.e. the Deputy Chief Justice) and seven other judges.[48] It has both original and appellate jurisdiction, the original jurisdiction being unlimited, both

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46. See above, foot note 24.

47. Constitution of Northern Nigeria, Laws of Northern Nigeria, 1963, s.50.

48. High Court Law, op.cit. s.4.

in civil and criminal matters. According to the High Court Law, its general jurisdiction is the same as that of "Her Majesty's High Court of Justice" in England.[49]

However, the High Court Law also provides that the High Court is to have no original jurisdiction in a suit or matter which is subject to the jurisdiction of a native court and which relates to marriage, family status, guardianship of children or inheritance or other disposition of property on death.[50] The effect of this provision is that the High Court has no original jurisdiction in matters concerning family law within the sphere of "native law and custom" irrespective of whether such "native law and custom" is the Sharia or whether it is another brand of "native law and custom". Its appellate jurisdiction is also similarly curtailed. The Court has a general appellate jurisdiction to hear appeals from the decisions of all subordinate Courts, but it may not hear appeals from the decisions of Shari'a Courts on"questions relating to Moslem matters".[51] "Questions

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49. Ibid, S.13.

50. Ibid, S.17 (1) (b).

51. Ibid, S.62; and see also the Shari'a Court of Appeal Law, ibid, S.11.

relating to Moslem matters" has been defined both in the Northern Nigerian Constitution and in the Sharia Court of Appeal Law,[52] and the following are stated to be questions of "Moslem matters" :-

i. Marriage concluded under "Moslem Law" (which term has also been defined and will be discussed later). This includes questions on the dissolution of such marriage, family relationships depending on it and guardianship of infants.

ii. Where both parties are Moslems, any question regarding a marriage, its dissolution, family relationship, foundling or guardianship of infants.

iii. Waqf, gift, will and inheritance where the endower, donor, testator or deceased is a Moslem.

iv. Questions of Moslem Law regarding an infant, a prodigal person or a person of unsound mind, and

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52. The Constitution of Northern Nigeria, ibid, S.53 (5); The Sharia Court of Appeal Law, ibid, S.11.

questions of maintenance or guardianship of Moslems suffering from physical or mental infirmity.

and

v. Where all parties to the proceedings, whether they are Moslems or not, have made a written request to the Court of the first instance to determine their dispute under Moslem Law.

We may observe that the position of the Sharia Law, at least in matters of family relations, is considered of sufficient importance in Northern Nigeria to be mentioned in the Constitution. We may also note that even in other matters generally, the Constitution of Northern Nigeria ensures that the Sharia viewpoint is at least made available to the Legislature before it passes any measure. Thus, the (now defunct) Northern House of Chiefs - the Upper Chamber of the Legislature - had among its ex officio members, the "Adviser on Moslem Law".[53]

The above provisions of the High Court Law have the effect of excluding certain Sharia matters from the jurisdiction

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53. Constitution of Northern Nigeria, ibid, Ss 5 and 6.

of the High Court. Such matters belong to the jurisdiction of the Shari'a courts (at first instance), and the Shari'a Court of Appeal has the final appellate jurisdiction in the matters. However, although the appellate jurisdiction of the High Court has not been excluded in other civil matters (for example contract and tort) originating from the Shari'a courts, in practice these matters seldom go to the High Court.[54] And even when they go to the High Court they are dealt with by a judge of the Shari'a Court of Appeal because all appeals coming from the native courts to the High Court are heard by the High Court (Native Courts Appeals) Division. This Division is constituted to include a Shari'a Court of Appeal judge.

The High Court is the highest of the "English type" of courts in Northern Nigeria. Appeals from it go directly to the Federal Supreme Court in Lagos. (However, it may be pointed out that State Legislatures are fully competent to establish Courts of Appeal that would hear appeals from the

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54. The total number of appeals within the native courts' structure for the calendar year 1964, for example, is 2,345 cases. Of these only 161 cases (mainly criminal cases) went to the High Court. See Burnett Notes, High Court of Justice, Kaduna.

High Court, but this has not been done in any of the Northern States).

Below the High Court are two other "English" courts : the "District Courts" established by and under the provisions of the District Courts Law,[55] and "Magistrates Courts" established by and under the provisions of the Criminal Procedure Code Law.[56] The District Courts are courts of civil jurisdiction only, while the Magistrates Courts are of criminal jurisdiction only.

The District Courts Law provides that the jurisdiction of the District Courts is confined to civil cases where the value of the matter in litigation does not exceed a specified amount.[57] The Law also provides that the Courts are to apply, in effect, English Law. This provision (of the law the District Courts may apply) is identical with the provision of the High Court Law in respect of the same matter.[58] However, "native law and custom" is not entirely excluded, because in certain circumstances it may be applied by the

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55. The District Courts Law, ibid, S.3.

56. The Criminal Procedure Code, ibid, especially Ss. 4, 6 and 8.

57. The District Courts Law, ibid, Ss. 13 and 14.

58. Ibid, Ss. 23 and 25; and cf. the High Court Law, ibid, Ss. 28 and 34.

Courts. (This is the case with the High Court as well). The Laws - both the High Court and the District Courts Laws - provide, for example, that in a transaction between a "native" and a non-"native", if the application of English law was either not envisaged by the parties, or if the application of English law will result in an injustice to one of the parties, then native law and custom may be applied.[59] They also provide that a person may not be deprived of any benefit under native law and custom. Thus, English law is the law of these Courts (District Courts and the High Court) with native law and custom applying only in very few and exceptional cases.[60] Their procedure is also governed by English law.[61]

The Magistrates Courts, which are courts of criminal jurisdiction only, apply the Penal Code and other penal enactments. The Criminal Procedure Code is their law of procedure,

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59. The High Court Law, ibid, S.34; District Courts Law, ibid, S.25.

60. Sometimes hesitantly. Thus, the Federal Supreme Court overruled a Kaduna High Court decision (by Bello S.P.J.) that a Muslim cannot oust the Shari'a Law of inheritance by making a will in the English form under the Wills Act - see Adesubokan v Rasaki Yunusa, Federal Supreme Court Case No. SC/25/70.

61. High Court Law, ibid, S.35.

and the Evidence Law - which governs both the District Courts and the High Court - is binding upon them.

The above three courts have almost everything in common : the type of law they apply, their procedure, the official language of the courts,[62] and the not unimportant fact that advocates have a right of audience in the courts.

Side by side with the "English law" courts, is the native courts system which comprises the different grades of native courts and the Shari'a Court of Appeal. The native courts were established under the Native Courts Law (which has now been reenacted in the Northern States in the form of Area Courts Edicts[63]). Their jurisdiction (and powers) depends upon their grades, and the "Warrant" establishing them.[64] But, briefly, they may be divided into three categories :

i. those having criminal jurisdiction only

ii. those having civil jurisdiction only, and

iii. those having both civil and criminal jurisdiction.[65]

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62. i.e. English

63. Since the Military take over, State Government legislation is by Edicts under the hands of the State Governors.

64. See Chapter I, Part 2 below.

65. Area Courts whose jurisdiction is solely criminal or solely civil are found only in the North Eastern State.

In criminal matters they apply the Penal Code, various Bye-laws and other penal legislation which they have been expressly empowered to administer.[66] In criminal procedure they are bound by certain sections of the Code of Criminal Procedure - hereinafter referred to as the C.P.C., - and they are to be generally guided by the rest of it.[67] In civil matters they are, as a general rule, to apply native law and custom; but in theory (though they hardly ever do so in practice) they may apply English law in some cases. Their procedure in civil matters is governed by the Native Courts (Civil Procedure) Rules.[68]

The term "native courts" is, as explained earlier, a generic term which covers the various indigenous judicial tribunals which originally dispensed "native" justice only. These tribunals were constituted "native courts" by the Native Courts Law[68a] and its predecessor enactments. They include all the Sharía Courts and "native law and custom" is

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66. The Federal Constitution of Nigeria, S.22, prohibits the application of non-statutory criminal law. See also the Penal Code Law, Laws of Northern Nigeria, 1963, S.6.

67. C. P. C. S.386.

68. Now the Area Courts (Civil Procedure) Rules, 1971.

68a. Laws of Northern Nigeria, 1963.

defined to include Shari'a law,[69] and therefore Shari'a Courts are governed by all the legislation on native courts.[70]

Although the demarcation of their respective jurisdictions seems clear enough, it is possible for the High Court and the Shari'a Court of Appeal to have conflicting claims to jurisdiction in respect of a case on appeal from the Area Courts. In order to resolve such claims, a special Court is established, called the Court of Resolution. It is staffed by the Chief Justice (as President), the Grand Khadi and one Judge from the High Court and one from the Shari'a Court of Appeal.[71]

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69. See above, f.n. 36.

70. A historical sketch of them is given in Part 2 below.

71. See the Court of Resolution Law, Laws of Northern Nigeria, 1963.

Part 2.

The "Native Courts" : Historical Sketch.

Under Islamic law the State is subordinate to the Shari'a, and it is the Shari'a which lays down the general form and functions of the State and all the public institutions of the State. Indeed, the legal basis of the whole fabric of social organisation is the Shari'a;[1] the State itself may be said to exist in order to carry out the general duty of enforcing the Shari'a.[2] It has no unfettered legislative powers, and such "administrative regulations" as it makes must conform to the Shari'a. The legal basis of any action, any decisions or any measure taken by the State must rest on the Shari'a. And whether in fact this rule is followed and acted upon or not, at least lip service is always paid to it by an Islamic State.[3]

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1. See the Shehu's : Ṯanbīhul-Ikhwān, translated by R. Palmer under the title: An Early Fulani Conception of Islam in the Journal of African Society, 1914, especially p.56; Wathīqat-ahl-Sūdān, op.cit.; Kitābul Farq, translated by Hiskett in the Journal of the Royal Asiatic Society, 1955, Vol. 23, especially p.570. See also the discussion on this in Abul Ala Maudūdi: Islamic Laws and Constitutions, translated by Kurshid Ahmad, Lahore, 1967, pp. 131-132.

2. See, for example, Maudūdi, op.cit. especially p. 214.

3. See for example the Pakistani Constitution of 1962, Art.7, which requires all state organs to act in conformity with the "Principles of Policy" which in turn pay lip service to the Shari'a.

As has been pointed out previously, the founders of what later became Northern Nigeria intended to, and did, establish a state based on the Shari'a - a Dar-el-Islam. The basic law was the Shari'a. Public institutions, like the courts, which the rulers of the State established, were established in accordance with the injunctions and requirements of the Shari'a, as they understood it.[4]

When the British established themselves as the new rulers of the country a change of policy was ipso facto wrought; the Shari'a was no longer the ultimate basis, the test of legitimacy for State activity. The new basis was now legislation made by the new rulers.[5] The application of the Shari'a itself depended on the laws introduced by the British.

The British, in accordance with their policy of "Indirect Rule", allowed the institutions of State and the machinery of government which were in existence to continue functioning within limits and subject to certain conditions.

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4. See, e.g., the Shehu's Kitābul Farq op. cit. p. 570; Wathīqat, op. cit. especially p. 240.

5. In the form of "Proclamations" in the early days and later on Ordinances and Regulations. Some of these are considered below. Lugard was empowered by the Northern Nigeria Order in Council, 1899, to legislate by Proclamation. See Appendix to the Laws of Northern Nigeria, 1910, p.695.

They were content to impose a superstructure upon the indigenous system : the indigenous institutions were administering the country, the British superstructure was controlling and supervising the native institutions in their administration of the country.[6]

We are only concerned here with the effect of this policy upon, and its working in respect of, the machinery of justice. We should therefore start at the point where Lugard, having been appointed "High Commissioner" for the Protectorate of Northern Nigeria, and having brought most of Northern Nigeria under British control, divided the Protectorate into political divisions called "Provinces". Each of the Provinces was put under the charge of a "Resident".[7] Lugard legislated by "Proclamation", and the first Proclamation on the administration of justice to the general native population was the Native Courts Proclamation of 1900.[8] This was enacted to provide "for the better regulation and control of native courts."

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6. e.g. "Native Authorities" headed by Emirs under the general control of the District Officer (the D.O.).

7. See Lugard's Annual Reports on Northern Nigeria, 1900-1911 e.g. p.8.

8. No. 5 of 1900.

The main provisions of interest are as follows :

i. The Resident was empowered to establish in his Province by warrant under his hand, such native courts as he deemed fit. But the courts were to be established with the consent of the Emir or "Head Chief" of each native authority area, and with the approval of the High Commissioner.

ii. The courts were to administer native law and custom prevailing in the area of jurisdiction of each court - in both civil and criminal matters. In criminal matters they might award any punishment, and in civil matters they might make any order, that native law and custom authorised - subject to the condition that no inhuman treatment (like mayhem) could be inflicted. And they could not inflict the penalty of death.

iii. The Emir or chief was to appoint the judges, subject to the Resident's approval; where there was no Emir or chief, the Resident appointed the judges.

iv. The Resident had the power to enter the courts at any time, and to inspect them. He could transfer a case from one court to another, he could review the findings of a court and order a retrial or modify the sentence (or the order) of the courts.

v. The practice and procedure of the courts was to be governed by native law and custom, subject to Rules that might be made by the High Commissioner.

These provisions laid down the new pattern of organisation of native courts and subsequent enactments continued to incorporate the substance of the 1900 Proclamation. But the provisions did not bring about any fundamental practical changes in the native courts system. The native courts that were in existence before the Proclamation was promulgated continued to function as before. The only difference now was that they were given a warrant (by the new rulers). The warrant contained the name of the judge and defined the area of jurisdiction of the court. The then existing judge was appointed by the Emir[9] and continued in his office - the warrant merely

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9. As will be seen in Chapter II below even this is not in conflict with the Shari'a procedure.

confirming him in his position - and the territorial limits of his jurisdiction continued to be co-terminus with one of the administrative sub-divisions ("Districts") of the emirate.[10] However, the warrant left the Court in no doubt that (at least in theory) it was the Resident who established the Court, and that he established the Court by virtue of powers enabling him in that behalf granted by the Proclamation. And, in addition to the Courts that were in existence at the time of the enactment of the Proclamation, some new Courts were established by the Residents in those areas that needed Courts and had done.[11]

The native courts thus established (or deemed to have been so established) had no jurisdiction in "cantonment areas" (i.e. areas reserved by the British for Government offices and quarters).[12] They also had no jurisdiction over non-natives or those natives who were in the Government's service, and they had no jurisdictionto try statutory offences or to hear civil cases governed by English law. To deal with

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10. See Lugard's Annual Report on Northern Nigeria, 1900-1911.

11. Ibid.

12. To this day these Cantonment Areas remain outside the jurisdiction of the Shari'a and other Area Courts -

all these matters there were established English Courts which were in no way connected with the native courts. Thus there were two separate systems of courts, having no connection with each other either by way of appeals, supervision or in any other way. The only mode of controlling the native courts was administrative - the Resident and, when these were appointed, other "Political Officers" (i.e. the "District Officers" and the "Assistant District Officers").[13]

Another noteworthy aspect of the Proclamation of 1900 is that it made no provision for appeals within the native courts system. The litigant's right "to have recourse to the Sultan's door" became modified by substituting the Resident's door for the Sultan's.

The 1900 Proclamation was followed by the Native Courts Proclamation of 1906, which introduced few changes. First, there were now to be two types of native courts : the "Alkalis' Courts" and "Judicial Councils". Both were to be established by warrant (as before) under the Resident's hand. The Alkalis' Courts were to be presided over by the Alakalis, with or without conciliar helpers, and the Judicial Councils

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13. These officers had power to enter into any native court and could "review" the decisions of the Courts.

were to be presided over by the Emir or chief with such other members as the Resident might determine.[14] This provision was the beginning of the statutory mention of Alkalis specifically. It has been suggested that the establishment of Judicial Councils was to cater for the Emirs' siyāsa jurisdiction and to provide courts for non-Moslem areas of the country.[15] Whatever may have been the philosophy of the legislation it began the trend whereby some of the judicial prerogatives of the Emirs were revived. These included their getting back unlimited civil and criminal jurisdiction, including jurisdiction in homicide cases, even those punishable with death. And this in turn led to the Emirs' courts specialising in homicide cases and cases of land (ownership) disputes.[16] Some people, in fact, assumed that under Islamic law land (ownership) disputes are outside the jurisdiction of Shari'a

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14. See generally, the Native Courts Proclamation, 1906, No. 1 of 1906, Laws of Nigeria, 1910.

15. See E. A. Keay and S. S. Richardson : The Native and Customary Courts of Nigeria, London, 1966, p. 26.

16. These are the traditional areas of "political justice". Cf. for example Calif Omar's instruction to all his lieutenants that no capital cases should be executed without his prior confirmation - see Ibn Farḥūn : Tabsirat-ul-Hukkām, (on the margin of 'Ulaish), Cairo, 1958, I p.17.

Courts, and belong to the Emirs only. This erroneous view had such a large amount of influence that it became and remained for a long time the unwritten rule.[17]

Secondly, the powers of appointment, suspension, dismissal and discipline were transferred to the Resident, but he was required to consult the Emir or chief before he exercised his power, and he needed the approval of the High Commissioner (which was presumed granted).

Thirdly, provision was made for native appellate courts. The Resident was empowered to appoint (by warrant) either the Alkali's or the Emir's Court in his Provincial capital to be an Appeal Court and to define its appellate jurisdiction.

Apart from the changes enumerated above, the position remained as before. The British political officers controlled the courts by appointments, inspections and reviews, but they did not directly interfere in their deliberations; the Courts remained self-contained, subject to no interference by British Courts, either by way of appeals or otherwise.

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17. It had been the practice in Northern Nigeria to refer all land cases to Emir's Courts, until the 1967 Area Courts Edicts deprived them of all judicial power.

The next enactment which deserves mention here is the Native Courts Ordinance of 1918, passed after the amalgamation of North and South of Nigeria into one country. The important point of the 1918 Ordinance was the grading of the native courts into four grades. Their territorial jurisdiction was still defined in their warrants of establishment, and their "personal" jurisdiction was defined in the Ordinance itself; but their jurisdiction and powers in respect of subject-matter was defined in Regulations made under power granted by the Ordinance. The Regulations defined the jurisdiction and powers of each grade of Court, beginning with Grade A Courts (which were given unlimited jurisdiction in both civil and criminal matters) to Grade D Courts whose jurisdiction was limited to cases where the subject-matter of litigation did not exceed £10. Another innovation in the Ordinance was that the courts were empowered to administer certain Ordinances if the Governor, by order, empowered them to do so. The Ordinance also provided that where the native court was presided over by an Alkali it was to be called an Alkali's Court. Finally, the Courts were required to keep a certain number of records.

In 1933 the Native Courts Ordinance and the Protectorate Courts Ordinance were enacted. The latter Ordinance established a High Court for the whole Protectorate of Nigeria (excluding

Lagos Colony) with jurisdiction throughout the Protectorate. However, the Ordinance specifically excluded general jurisdiction in matters of (title to) land subject to native law and custom from the High Court. (This exclusion was extended in 1945 to all matters of family and personal status, and this remains on the statute book to this day).

The Native Court Ordinance, 1935, marks the beginning of the integration of the judicial systems - through appeals. Until the promulgation of that Ordinance, there were, as noted above, two separate systems of courts - the British administering English law within a narrow compass, and confined in their jurisdiction to English law alone, and the native courts administering native law and custom - the two systems never meeting at any point. Under the Ordinance, the newly established High Court of the Protectorate was empowered to hear appeals from native courts in certain cases. This integrative process continued until the Area Courts Edicts of 1967 brought all native courts under the control of the Chief Justice.[18]

What might be called the modern era of native courts may be divided into two phases : the period beginning with

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18. Area Courts Edict, 1967, Laws of the North Eastern State of Nigeria, 1967 and 1968, s.3. The law came into operation on 1st April, 1968.

the introduction of a federal form of Constitution in Nigeria, and the 1967 Legislation. The most important legislation of the first phase is the Native Courts Law, 1956, which, with amendments,[19] remained in force until its repeal in 1968 by the Area Courts Edicts. The following provisions of the law as amended are of interest :-

i. Native courts were to be established by the Provincial Commissioner's warrant, subject to the approval of the Minister of Justice.[20]

Both the Provincial Commissioner and the Minister of Justice are newcomers on the scene. The Provincial Commissioner replaces the former British Resident and was in charge of his Province. The office of Minister of Justice was newly established and was given the charge of native courts. The native courts to be established by the Provincial Commissioner included Emirs' Courts as well, but it was the Governor's prerogative to appoint the Emir as a judge of the Court.[21] The Emirs' Courts were conciliar courts which had to include

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19. See Native Courts Law, Laws of Northern Nigeria, 1963.

20. Ibid, S.3.

21. Ibid, S.4.

other members than the Emir.[22] Other native courts were constituted either by an Alkali with or without members, or by a President with or without members.[23]

ii. Appointment to the judicial offices (alkalis, presidents, and other members) was to be made by the Native Authorities in whose areas the Courts were established, but subject to the approval of the Minister of Justice.[24]

iii. The Native Authority was also required to appoint a Registrar, Clerk or Scribe, whose duties included preparing all warrants for issue, the recording of the Court's proceedings, and keeping the accounts of the Court. Interpreters, bailiffs and messengers were also required to be appointed by the Native Authority.[25]

iv. Every native court was to have jurisdiction within

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22. Ibid, S.5.

23. Ibid, S.5.

24. Ibid, S.6 (3).

25. Ibid, S.12.

territorial limits defined in its warrant "over persons and classes of persons who have ordinarily been subject to the jurisdiction of native tribunals". It was also given jurisdiction over other specified categories of persons. However, (a) the Governor-in-Council could direct that any other person or class of persons should be subject to the native courts' jurisdiction; (b) he may also direct that a person (or class of persons) otherwise within the jurisdiction of native courts should be excluded therefrom;[26] (c) if in any cause or matter any person alleges that he is not subject to the jurisdiction of native courts, he can apply to the High Court for a declaration to that effect and the High Court is required to decide the issue.[27]

v. There were to be five grades of native courts - A, A Ltd., B, C, and D. The Provincial Commissioner's warrant merely established a court of a specified grade

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26. Ibid, S.18. Thus, Companies, for example, have been excluded - see Native Courts (Limitation of Powers) Order, Northern Nigerian Legal Notice No. 320 of 1957.

27. Ibid, S.19.

> but he could change the grade of the Court to a higher or lower grade, subject to the Minister's approval. The subject-matter jurisdiction and powers (i.e. of sentencing) of the Courts were set out in the Schedule to the Law. However, the Governor-in-Council could vary the grades, jurisdiction or powers of the Courts and he could confer additional jurisdiction and powers to any Court as he saw fit.[28]

The issue of jurisdiction and powers of the Courts is of significance mainly in criminal matters, and therefore of little importance for the purposes of this thesis. It therefore merits only very brief treatment here.

Grade A Courts were the Emirs' Courts. They had unlimited jurisdiction in both civil and criminal matters, including trying homicide cases punishable with death. Grade A Ltd. Courts were the Courts of "Chief Alakalis", and they had unlimited jurisdiction in civil matters and their criminal jurisdiction was only limited by the requirement that they were not to try homicide cases. The other three grades had

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28. Ibid, S.20.

variously limited jurisdiction in criminal matters. The Schedule to the Native Courts Law only sets out the limits of their sentencing powers; their jurisdiction to try any given offence was a matter governed by the Code of Criminal Procedure.[29] (And, as from 1960, even native courts could only administer statutory criminal law).[30]

In civil matters, the question of jurisdiction depends both on the subject-matter of the litigation as well as the monetary value (or estimated value) if any, of the subject-matter. We may therefore conveniently divide civil litigation coming before the Courts into two :

i. those cases where proprietary rights are not in issue (or are negligible), for example marriage contracts or the dissolution of marriages,[31] guardianship, and

ii. those cases where proprietary rights and monetary claims are the point (or the main point) in issue.

In respect of the first category jurisdiction was given to Courts of all grades; in the second, however, the

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29. See the C. P. C. (ibid), Appendix A to the Schedule.

30. See the Penal Code,Law, ibid, S.6, and see below.

31. Questions of nafaqa or mahar may sometimes arise here but not as main issues.

jurisdiction of Courts grades B, C and D was confined to suits involving not more than a specified amount commensurate with the grade of each Court.[32] In practice grade A Courts - i.e. Emirs' Courts - confined themselves to matters affecting land; grades C and D mainly dealt with matrimonial matters, and what one may call petty cases.

vi. Provisions were made governing such matters as venue, practice and procedure, the law the Courts were to apply, control of the Courts, appeals and "Rules" to be made by the Governor.[33]

What is the present position of native courts? This is to be found largely in the newly promulgated Area Courts Edicts which came into operation in all the six Northern States on the 1st April, 1968. Before discussing the main points of interest ofthe new legislation, a word on the socio-political background and the philosophy behind the legislation.

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32. See the Schedule to the Native Courts Law, ibid.

33. See S.75, ibid.

As far back as the late fifties there were complaints against the native courts' administration of justice mainly in criminal matters. Those were the days of intense party-political activity in Nigeria, and the Native Authorities (the Local Government bodies hereinafter referred to as the N. A.) in the North were powerful bodies and powerful allies of the Government. Their statutory powers of appointment and disciplinary control of the native courts' personnel,[34] coupled with the similar powers they possessed over the N. A. Police and the N. A. Prisons, ensured that matters of "law and order" in Northern Nigeria were firmly under N. A. control. Opponents of the Government accused the Government and the N. As. of improperly using the courts and the other coercive instruments in the hands of the N. A. to stamp out political opposition to the Government. In particular, the native courts and the N. A. Police were contrasted with the "English" Courts (High Court and Magistrates' Courts) and the Nigeria Police (a Federal Government Police Force). The latter have always been insulated from political control and had never allowed themselves to be embroiled in political controversy.

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34. Ss. 6 and 12-15, ibid.

The critics took the view that if the native courts were to be taken out of N. A. control things might be different. This view gained support as the years passed by (and as the native courts became more susceptible to misuse by politicians). By the time the Military took over the Government the dissatisfaction with the native courts had reached such proportions that radical changes were considered necessary.[35]

It was considered desirable that the native courts (together with the N. A. Police) should be removed from the control or indeed any form of influence of the N. A., and the then Northern Nigeria Government set out to do so in two stages. The N. A. Police and N. A. Prisons were taken over by and absorbed into the Nigeria Police and the Federal Prisons Department respectively. The native courts which were partly Government, but mainly N. A. controlled, were brought under the Chief Justice of Northern Nigeria.[36] As far as the native courts were concerned, the take over was done by repealing the

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35. Almost all of the alkalis (Judges of the Sharia Courts) I asked about this criticism agreed that there were improper political pressures on them when they were under the N.A.

36. See Area Courts Edict, 1967, Laws of Northeastern State of Nigeria, 1967, S.3.

Native Courts Law 1963, and replacing it by the various Area Courts Edicts which (as shown above) came into effect in 1968. When the proposals to reform the native courts were first made the Northern Region was still a single entity; but by the time the proposals were put in a legislative form the North had been broken up into the present six States. Because of this each of the six States had had to pass the legislation for its jurisdiction, but the Edicts (i.e. the Laws) are identical. The Edicts were named "Area Courts Edicts", thus dropping the name "native courts" (the Edicts themselves renamed the courts "Area Courts"). The main purpose of the legislation, according to its framers, was to ensure the Courts' "full independence in their judicial functions" by their removal from control by N. A. or any Ministerial department of Government and bringing them under the Chief Justice.[37]

What are the main provisions of the Edicts, and what changes have the Edicts brought about in the native courts ? In terms of the political problems that the Edicts were designed to solve, the most important change is in the administrative control of the Courts. But apart from this - undoubtedly

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37. See the Explanatory Memorandum to the Area Courts Edict, ibid.

very important - change, no other radical changes have been introduced by the Edicts.[38] (In dealing with the provisions of the Edicts it is sufficient to deal with the provisions of the Edict of one State only since the provisions in all the Edicts are identical - as has been pointed out above . We should therefore be dealing with the provisions of the North-Eastern State Edict).

The most important section is perhaps S.3 of the Edict which invests the power to establish the Courts with the Chief Justice rather than with any "political" or any extra-judicial officer. The section provides that the Chief Justice, by warrant under his hand "may establish such area courts as he shall think fit" and he may assign to each Area Court such name as he deems appropriate. Every Area Court is to exercise such jurisdiction as is conferred on it by its warrant within the territorial limits set out therein. But the Chief Justice

> "may at any time suspend, cancel or vary any warrant establishing an area court or specifying the area within which or the extent to which the powers of an area court may be exercised."

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38. The legislation was only concerned with the political and not a juristic problem.

Section 4 provides that the composition of an Area Court is to be either

> "(a) an area judge sitting alone, or (b) an area judge sitting with one or more members".

It also provides that all area judges and all members of Area Courts are to be public officers in the public service of the State[39] - with the Public Service Commission as the body invested with the power of appointment, dismissal and disciplinary control over the personnel of the Courts.

The effect of these provisions is threefold: first, the Chief Justice takes over the functions assigned under the former Law to the Provincial Commissioner (or Resident) and the Minister of Justice, of establishing native courts. He also takes over the functions of the Governor-in-Council of varying the grades of the Courts and of conferring additional jurisdiction upon them. Secondly, the former Emirs' Courts have been abolished (thereby depriving Emirs of any judicial powers. The Emirs protested - to no avail - that they had been turned into ciphers). And thirdly the newly created courts are no longer divided into Alkalis' Courts and other native courts. Indeed the use of the term alakali has been deliberately avoided in the Edict. Instead, the Courts are to be presided over by

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39. The Area Courts Edict, ibid, S.10.

an Area Judge - who may or may not be an alkali (i.e. learned in the Shari'a); but

> "all questions of Moslem personal law shall be heard and determined by any member of an area court learned in Moslem law sitting alone." 40

The implication of this last mentioned provision is discussed below, but it should be observed here that the provision (that only "questions of Moslem personal law" need be referred to a member of the Court learned in Moslem law) raises some theoretical problems -

The Courts are graded into four grades : Upper Area Courts, Area Courts Grades I, II and III. Their jurisdiction and powers are set out in the First Schedule to the Edict, as follows :

i. Upper Area Courts have both original and appellate jurisdiction in both civil and criminal matters. Their appellate jurisdiction is to hear appeals against the decisions or orders of any of the other area courts in both civil and criminal matters. Their original jurisdiction is unlimited in both civil and criminal matters, except that they have no jurisdiction in homicide cases.

40; Ibid, S.4 (2).

ii. All other Area Courts have only original jurisdiction which is limited. Some of the Courts have (by their warrant) only civil, and others only criminal jurisdictions.[41] But most of them have both civil and criminal jurisdictions and the Chief Justice may vary the jurisdiction of any Court by endorsing the change on the Court's warrant. (Their criminal jurisdiction is defined by the Criminal Procedure Code, and need not engage much of our attention here. Only their power to inflict punishment is defined in the Schedule to the Area Courts Edict.[42]) Their civil jurisdiction, in cases involving claims of monetary value, is limited according to their grades. The jurisdiction of Grade I Courts, for example, is limited to cases where the subject-matter of litigation does not exceed £500 in matters other than land, and

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41. The division of the Court's jurisdiction into civil and criminal has only been done in respect of the North Eastern State, and even there all but sixteen Area Courts have both civil and criminal jurisdiction. See the Area Courts (Jurisdiction) Notice, N.E.S.L.N. No. 4 of 1968.

42. See First Schedule to the Edict, ibid.

£1,000 in land matters.[43] Grades II and III Courts are limited in their jurisdiction to correspondingly smaller sums. However, in matters such as dissolution of marriage and custody of infant children where monetary claims are not primarily in issue, all Courts have jurisdiction.[44]

The Sections of the Edict dealing with jurisdiction ex personae have introduced some changes. The former law conferred jurisdiction "over persons and classes of persons who have ordinarly been subject" to the native courts' jurisdiction, but the Edict appears to widen the area of the Courts' jurisdiction over persons, and is more specific in its definition. Thus, Section 14 provides that any person may institute proceedings in an Area Court, and any person who institutes proceedings in the Courts makes himself thereby subject to their jurisdiction, including appellate jurisdiction. However, more specifically, it is provided that the following are subject to the jurisdiction of Area Courts :-

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43. See Second Schedule, ibid.

44. Ibid.

"(a) Any person whose parents were members of any tribe or tribes indigenous to some part of Africa and the descendants of any such person

(b) Any person one of whose parents was a member of such tribe

(c) Any other person in a cause or matter in which he consents to the exercise of the jurisdiction of the Area Court." 45

The Governor may by order exclude from the jurisdiction of Area Courts any person or class of persons.[46] Again the High Court has the power to enquire and determine the issue whether any person who objects to the jurisdiction of an Area Court is or is not subject to the jurisdiction and its determination is final.[47]

Control of the Courts.

As has been shown above the native courts were originally not under the control of the High Court, and the High Court did not even exercise a supervisory jurisdiction over them. They were controlled by Administrative Officers (formerly called Political Officers), the District Officers and the Residents of the Provinces.

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45. The Area Courts Edict, ibid, S.15 (1).

46. Ibid, S.15 (2).

47. Ibid, S.16.

The Administrative Officers' powers of control over the native courts was exercised by means of their "review" jurisdiction. They not only had the power of entry into and inspection of the Courts, they could also review the judgements or orders of the Courts, and by this means they exercised some form of appellate jurisdiction.

The repealed Native Courts Law abolished the powers of Administrative Officers over the Courts and handed the powers over to a new official called the Inspector of Native Courts. This official was not, however, given the full powers formerly possessed by the Administrative Officers. They were not given appellate jurisdiction by means of "review". The Inspectors were officials of the Ministry of Justice under an official called the Commissioner for Native Courts, again a Ministry of Justice official who was a sort of "Director" of native courts. He and his Inspectors were to ensure efficiency and high standards in the Courts.

The 1967 Edict maintained this position with some modifications. All the Courts are now under the general supervision of the High Court under the Chief Justice.[48] The High Court now has power to stay proceedings in an Area Court

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48. Ibid, S.43 (1).

and transfer the case (the subject-matter of the proceedings) to another Court having jurisdiction in the matter if in the opinion of the High Court such a course is necessary in order to secure the ends of justice.[49]

The Edict also retains the office of the Commissioner of Native Courts and Inspector of Native Courts under the new titles of Commissioner for Area Courts and Inspector of Area Courts respectively. The Commissioner, as a matter of administrative practice, is also the Chief Registrar of the High Court who in his own right has the judicial powers of a "Chief Magistrate" and who is a barrister of ten years standing. His duties in regard to the Area Courts include the advising of the Chief Justice in respect of the constitution, jurisdiction, and membership of the Courts, and the organisation, guidance and supervision of the Courts, subject to the general or special directions of the Chief Justice. And he has the powers of an Inspector.[50]

In each of the six Northern States there is a Chief Registrar who is ipso facto the Commissioner for Area Courts of the State. However only two such Chief Registrar/Commissioners

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49. Ibid S.43 (2).

50. Ibid, S.44.

for Area Courts have any knowledge of the Shari(a, and it has therefore been found necessary to appoint another official, under the Chief Registrar/Commissioner, who is learned in the Shari'a. The official is designated the "Chief Inspector of Area Courts" and he advises the Chief Registrar/Commissioner concerning the general administration of the Area Courts.

The Edict provides that Inspectors of Area Courts shall be appointed; that they shall have access, at all times, to all the Area Courts throughout the State, and to the records and proceedings of the Courts.[51] Their powers include the power to stay the proceedings in any cause or matter at any stage of the proceedings before final judgement, and then transfer the case to another Court (native court or otherwise) to hear and determine.[52] They also have the power to "report" a case that has been heard by an Area Court to another Area Court having appellate jurisdiction in the matter if they think there has been a miscarriage of justice. The Court to which the case has been reported may reverse, vary or confirm the decision of the Court which heard the case originally.[52a]

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51. Ibid, S.45.

52. Ibid, S.46.

52a. Ibid, s.50.

How are the Shari'a Courts and the application of the Shari'a affected by the foregoing provisions of the 1967 Edicts ? Under the repealed Native Courts Law, Shari'a Courts may be said to have had specific statutory recognition - by providing for Emirs' and Alkalis' Courts. The Edicts have done away with the Emirs' Courts and no mention is made in them of alkalis. Its declared aim is to integrate the native courts into the "English" Courts system under the Chief Justice. The only concession it has made to the Shari'a is the requirement that questions of "Moslem personal law" are to be heard and determined by a member of the Court learned in Moslem law sitting alone.

On the face of it, the aim of the framers of the Edicts would appear to be to gradually whittle down the influence of the Shari'a (along with other native laws) until they wither away as a separate entity. This would end the existing dichotomy in the Judiciary. The Shari'a itself, as well as other types of "native law and custom" need not disappear entirely under this arrangement : they would continue to be applied in appropriate cases by the new single-unit Judiciary.

However, whether this is the aim in theory or not, in actual practice the Shari'a Courts still remain in existence. All that has happened to them is that they have suffered a

change of official title - from "native courts" to "Area Courts", and the judges from alkalis to Area Judges. They continue to be regarded by the public (and to regard themselves) as Shari'a Courts and it is the Shari'a that they continue to apply in all civil matters. And it is difficult to see how the position could have been otherwise in practice, since the Courts that were in existence prior to the Edicts simply continued in operation. (Legally they are deemed to have been constituted by and under the provisions of the new Edict). The only practical effect upon them of the new legislation has been external - the changes introduced in the agencies of control over them. In their internal organisation, administration and procedure, practically everything remains as before. It would be interesting to examine the position after, say, ten years to see what changes if any have taken place.

The rather restrictively worded provision that only matters of "Moslem personal law" need be referred to a Court member qualified in "Moslem law" raises some theoretical problems, in a "mixed court" - i.e. a non-Shari'a Court having one of its members a person learned in the Shari'a. According to the Edict,[53] "Moslem personal law" is to have the same

53. Ibid, S.2.

meaning as in the Shari'a Court of Appeal Law. In that Law[54] it is defined to include only the strictly personal status matters and no others. Now, supposing two Moslem litigants appear before such a court, with a contract case, in theory there is nothing to stop the case being heard and determined by a non-Shari'a-qualified member of the court. This undesirable possibility is not necessarily helped by the requirement of the Edict that Area Courts are to apply what may be called "the proper law" of the contract. Unless this is taken to imply that in such a case as this, where Shari'a is "the proper law", the Shari'a-qualified member is to be the sole judge. This is a reasonable, but not a necessarily correct, interpretation of the requirement to apply the proper law. I have asked some Inspectors of Native Courts what their views and understanding are on this issue. All of them said that the unfortunate position, as they understood it, is that not only is my suggested interpretation incorrect, but that such a (mixed) court is under no obligation to apply the Shari'a at all in the non-enumerated personal status matters. Such a court may apply the native law applicable in its area of

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54. See ibid, S.2, and the Shari'a Court of Appeal Law, S.11.

jurisdiction, unless the parties make a written request to have the Shari'a applied in their case. Furthermore, when such a "mixed" court decides the case, an appeal lies to the High Court and not to the Shari'a Court of Appeal.[55]

Procedural Provisions in the Edict.

The provisions dealing with the jurisdiction of the courts (territorial, personal and subject-matter) have already been dealt with. It has also been noted above that questions of Moslem personal law are to be decided in a specially prescribed manner.[56] In this part some of the statutory procedural provisions binding the courts will be considered generally. Other such provisions will be considered in appropriate places in the thesis.

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55. But see the composition of the High Court for this purpose (above, p. 33)

56. I.e. in effect by a Shari'a judge.

a. Sessions

Section 7 of the Edict provides that "subject to the provisions of any written law " (presumably laws regulating public holidays, for example),

> "an area court shall hold sessions at such times and places as may be necessary for the convenient and speedy despatch of the business of the court."

But

> "the Chief Justice may direct that sessions shall be held at such times and places as he may think fit."

This provision, from the point of view of the Shari'a requirements on the same topic, is a happy one. As will be seen when the point is dealt with from the Shari'a position, the provision has the effect of enabling Shari'a Courts to regulate their sessions in accordance with the Shari'a. The power of the Chief Justice to regulate the sessions of the Courts is hardly ever used, and even if used is unlikely to to be used to interfere with the Shari'a.

The section also provides that a Court may sit in two or more divisions for the more convenient despatch of its business. This provision is relevant in the case of those Courts which have a mixed membership with a President. The composition of such Courts is usually : a member learned in

the Shari'a, and other members learned in some native law or other, and the President of such a court may be either the Shari'a member or one of the others. If the court sits in two or more divisions it would be possible to have all the "Moslem" cases in its jurisdiction handled by the Shari'a member.

b. Venue.

This primarily concerns questions of territorial jurisdiction (to which court must an intending plaintiff take his claim ?) but questions of the subject-matter jurisdiction may also arise, because a court may have the territorial jurisdiction but lack the power to deal with a case.

The rules as laid down by the Edict - which are just a reenactment of the 1956 provisions - may be stated thus :

i. Where the subject matter of litigation is land, or matter connected with land, jurisdiction belongs to the court in whose area of territorial jurisdiction the land is situated.[57]

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57. The Area Courts Edict, s.19.

ii. In all other civil matters jurisdiction belongs to the Court in whose area of jurisdiction the defendant ordinarily resides, or was, when the cause of action arose.[58]

It may be observed that neither the repealed Law nor the new Edict makes any rules of venue in respect of distribution and administration of estates of deceased persons. It is true that Section 19 (2) makes provision for "all other civil matters" (i.e. matters other than land dispute), but these do not necessarily include all cases of inheritance. This is because Section 19 (2) makes the defendant its point of reference, and in cases of inheritance there need be no defendant. However, a recent enactment has dealt with the matter. The Area Courts (Registration of Deaths) Edict 1969 provides that when any person dies, who was subject to native law and custom, the fact (of his death) must be brought to the notice of the nearest Area Court.[59] Such Area Court is to take into its charge the administration and the distribution of the estate, if any, of the deceased person. And it is now a criminal offence for any person to distribute or in any way to deal with such an estate without the Court's permission.

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58. Ibid, S.19.

59. See the Area Courts (Registration of Deaths) Edict, No. 1 of 1969, Laws of the North Eastern State of Nigeria, 1969, S.3.

Where a case is taken to a court which lakcs jurisdiction or power in the matter such a case is to be tranferred to a higher court having jurisdiction in the area.[60] Such transfer may be made by the lower court itself or, if the lower court fails to transfer the case, a higher court may order the transfer either on its own motion or on the application of one of the parties.[61] Conversely, if a case which is within the jurisdiction of a lower court is brought to a higher court, the higher court can, either on its own motion or on the application of one of the parties, remit the case to a lower court with jurisdiction in the matter in the area.[62]

c. Law to be administered by the courts.

As stated above, the warrant establishing a court states its grade and (in some cases) whether its jurisdiction is civil only or criminal only or both civil and criminal. In criminal matters a court is required to apply only statutory criminal law[63] and to be guided in criminal procedure by the

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60. The Area Courts Edict, 1968, s.32.

61. Ibid.

62. Ibid, s.31.

63. Ibid, s.22 (a), and the Penal Code Law, s.6.

Code of Criminal Procedure and Evidence Law.[64] In civil matters, on the other hand, the Edict makes a number of rules which briefly stated are as follows :

i. A Court is required to enforce the Bye-laws made by Local Authorities and the provisions of any State statute which it has been empowered to administer under Section 24 of the Edict.[65] The Section (Section 24) empowers the Governor to confer on all or any native courts the power to enforce the provisions of any State statute. Under this power some Courts have been empowered to enforce statutory provisions of both criminal and civil nature . Examples of the latter are Rent Restriction and Personal Tax Laws which some native courts have been empowered to enforce.[66]

ii. As a general rule, a Court is required to apply the native law and custom prevailing in its area of jurisdiction or "binding between the parties".[67]

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64. The C. P. C., S.386(1), and see the Evidence Law, Laws of Northern Nigeria, 1963, S.1 (3).

65. The Area Courts Edict, 1968, S.22 (b).

66. See Northern Nigeria Legal Notice No. 130 and No. 156, of 1963.

67. The Area Courts Edict, 1968, S.20 (1) (a).

However,

iii. A Court may apply any principles of English Law if the intention of the parties when they entered into the transaction was that English Law should govern it. And no native law and custom which is repugnant to natural justice, equity and good conscience, or which is incompatible with any statute, may be enforced.[68]

The rule on repugnancy to natural justice etc. calls for comment.

It is not easy to decide the question : on the basis of what principles must natural justice, equity and good conscience be judged ? A person's views on the matter will depend upon - or will at least be largely conditioned by - his cultural milieu, so that the view of an English Judge of the High Court (or what one may call a "Nigerian-English" judge of the High Court) on the matter will necessarily differ from that of an alkali. For example, it may seem to the latter perfectly compatible with natural justice etc. to give four widows of a deceased one eighth of the estate to share among themselves even though one or more of them may have no children at all,

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68. Ibid, S.20 (2) (3).

and to give the rest of the estate to the only surviving son. This is unliekly to appeal to the "English" High Court Judge as anything other than a good example of repugnancy to natural justice and equity etc. To give another example, suppose a woman deserts her husband - both Moslems married under the Shari'a and fully subject to it and therefore both of them subject to the jurisdiction of the Shari'a courts. Suppose also that the woman seeks no divorce and the husband has not divorced her unilaterally, and therefore they are stilllegally married though physically separated. If such a woman goes and lives with another man for a period of say twelve months at the end of which she has a child sired by her lover and then seeks divorce from her husband to enable her to marry the lover, who is to be regarded as the child's father ? Is the court to apply the rule al walad lil firāsh - which would undoubtedly by flying in the face of the facts, especially when blood tests can at least show that the woman's husband is not the father ? We may note here the provisions of the Area Courts (Civil Procedure) Rules, (Order 13, rule 4). The rule provides that it is the native law (in our case the Shari'a) which governs what evidence a court decides to accept and the method of taking such evidence. This means that a Shari'a court may refuse to have anything to do with blood tests as a means of

fixing the biological paternity of a child and impose it on the husband. Or will this be regarded as repugnant to natural justice etc. ?

The provision requiring the courts to apply the native law "prevailing" in an area or that "binding between the parties" also calls for some comments. As for the law "prevailing", there are not many problems as far as Shari'a courts are concerned, since in the majority of cases these courts are in Moslem areas, and the law prevailing is the Shari'a.[69] However, the "law binding between the parties" raises two questions. First, is it at the court's entire discretion whether or not to apply it instead of the law prevailing in its area of jurisdiction ?[70] And, secondly, are there any guide-lines for the courts as to how to exercise this discretion ?

It may be suggested at the outset that in a case where the litigants are subject to a non-Shari'a native law, then even the requirement of natural justice, etc., may

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69. For example, 113 out of 141 Area Courts in the North Eastern State are Shari'a courts.

70. According to Burnett it is entirely in the court's discretion which of the laws they decide to apply; Burnett Notes.

suffice to make it incumbent upon the court to exclude the Shari'a in the case; but is the court bound to apply another law of which it has no knowledge, or can it decline jurisdiction ? It is perhaps best to leave these issues undiscussed since, interesting though they are - sufficiently important to merit mention - they are outside the scope of this thesis.

In addition to the above rules, other rules have been made governing what the Edict calls "mixed causes."[71] These are rules governing cases of conflict of law, and their gist may be stated thus : Where the parties are governed by different laws, the Court is to apply, in the case of land disputes, the law prevailing in the area where the land is situated.[72] In other causes than land the Court is to apply the law, or the combination of laws, which the parties agreed or intended or may be presumed to have agreed or intended, should govern their transaction. In the absence of any such agreement and where an intention cannot be presumed, the court is to apply the law which,in all the circumstances of the case,

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71. These have been defined (s.2, Area Courts Edict, 1968), as causes "in which two or more parties are normally subject to different systems of native law and custom."

72. The Area Courts Edict, 1968, s.21 (2).

ought to govern the transaction. In the last resort the Court is to be guided by the principles of justice, equity and good conscience.[73]

d. Appearance of parties and their witnesses.

The Edict provides that every Court

> "shall have power to summon before it for the purpose of giving evidence any person within the State" 74

and it may also apply to the High Court to order the taking of the evidence of a witness who is outside the State jurisdiction before another Court, or before an officer of such other Court outside the State.[75]

The parties to the proceedings may not be represented by legal practitioners, but, with the Court's permission, a party may be represented by a spouse or a relative.[76]

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73. Ibid, S.21 (1) (c).

74. Ibid, S.35 - compare the Shari'a provisions, Chapter III below.

75. Ibid, S.37 - compare the Shari'a provisions, Chapter III below.

76. Ibid, S.113 - compare the Shari'a provisions, Chapter III below.

e. Execution and enforcement of the judgements or orders of the courts.

The Rules made by the Chief Justice contain detailed provisions on how judgements and orders may be enforced; these are discussed below.[76a] But the Edict itself provides that the judgements of the courts may be enforced by the seizure and sale of the judgement debtor's property, and in other manner as may be prescribed by the Rules.[77] It also provides that the courts can issue interim orders and injunctions on how any property under litigation may be kept or dealt with pending the final determination of the litigation.[78] "Managers" may be appointed (or "receivers") to deal with any such property.

76a. See Chapter VI, part 2, below.

77. The Area Courts Edict, 1968, S.38 - compare the Shari'a provisions, Chapter III below.

78. Ibid, ss. 40 and 41.

CHAPTER II

THE COURT : ITS PERSONNEL, VENUE AND SESSIONS

Part 1 : Judges and Officers of Court - Appointment.

As shown in Chapter I,[1] the Area Courts Edicts in Northern Nigeria empower the Chief Justice to establish such "Area Courts" and assign to them such names as he deems fit. Acting under this power he has established (or is deemed to have established) "Area Courts" of which are what in this thesis are referred to as "Shari'a courts". They have here been called "Shari'a courts" because the law they apply in civil matters is the Shari'a, which, in their areas of jurisdiction - predominantly Moslem areas - is the "native law", and they are staffed by single judges who are (or who are deemed to be) learned in the Shari'a.

It is intended in this Part to consider the establishment of the courts and their staffing and their rules of venue and sessions; to consider the constitution of the courts as the arena where litigation and other judicial issues are fought out and determined. These are matters which in Northern

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1. Chapter I, Part 2.

Nigeria are governed by statutory enactments. The aim here is, therefore, to lay down the Shari'a provisions on the matter alongside the statutory provisions and their translation into practice. Comparing the two will enable us to see how far the actual practice is in accord with the requirements of the Shari'a, and how far, if at all, any conflict between the two may be resolved. This is desirable, it is submitted, because the Shari'a procedure which the courts are statutorily bound by, can only be satisfactorily applied within a judicial framework and structure capable of accommodating the Shari'a law.

The Shari'a requirements on the office of qādī.

The choice of sources and the justification for the choice.

What are the Shari'a requirements on the office of qādī - its establishment and appointment to it ? It is both unnecessary and undesirable, for the sake of answering this question, to enter into a long disquisition on the Sources of the Shari'a - the Usūl. The Usūl have received a good deal of attention and have been exhaustively treated. For the purposes of a study of Northern Nigeria - and, therefore, for the purposes of this thesis - it is in the texts of the Mālikī School that one must seek the answer to this and,

indeed, any other question on the Shari'a. This is because it is the Mālikī School which governs the lives of the people in Islamic matters in Northern Nigeria. All Fatwās are answered and all Shari'a cases are decided according to the Mālikī School; seldom are other views considered or entertained. One may search in vain through all the records of the courts for a single decision based on any authority other than a Mālikī authority.

The reasons for the dominance of the Mālikī School are a matter for historians;[2] but we may note here that the Shehu Usman b. Fodi had warned against exclusive adherence to the views of the scholars of one school only which, he said, was an erroneous practice.[3] His warning, however, has not been heeded, except that in recent times the judges of the Northern Nigeria Shari'a Court of Appeal have advocated the adoption of a non-Mālikī view in certain cases in the law of

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2. See the historial creasons Ibn Khaldūn gives as to why the Māliki School became the dominant school in Andalus and North Africa : The Muqaddima, translated by Rosenthal, London, 1959, Vol. 3, p. 12.

3. See one of the Shehu's Qasidās : Hidāyat-ul-Ṭulūb, published by the Gaskiya Corporation, Zaria, Northern Nigeria, (n.d.), p. 4.

inheritance.[4]

This fact - the exclusive authority of the Mālikī School - has been given statutory recognition and confirmation. The Sharī'a Court of Appeal Law provides that the Sharī'a Court of Appeal is to base its decisions on the Mālikī School.[5] Since appeals in Sharī'a matters end up in the Sharī'a Court of Appeal, the operational ambit of the Section covers the lower Courts.

Our original question may therefore be reduced to this : What are the Sharī'a provisions on the matter according to the Mālikī School ? In order to answer this question it is necessary to declare our sources and try to justify their choice. For the purposes of this thesis one cannot but confine oneself to the sources relied upon by the Courts in Northern Nigeria. The main sources are :

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4. See the memo issued by Alhaji Jibir Daura to Sharī'a judges in the North Central State on Inheritance and Procedure. He urged them to adopt the radd principle followed by rahm kindred before they resort to the Bait-el-Māl. This is because, he says, "it is now obvious that the conditions that entitle the Bait-el-Māl to be resorted to (as an asaba) are unfulfilled. And the conditions laid down by our leaders like Ali, Ibn Yūnus and Dardīsh, for resorting to radd and zawul arhām are satisfied." See the Jibir Daura Memo, pp. 3-4.

5. S.2 Sharī'a Court of Appeal Law, Laws of Northern Nigeria, 1963.

1. Commentaries on the Mukhtasar of Khalīl, especially Dasūqī's on the Sharhal Kabīr by Dardīr, and Adawī's commentary on Khirshī; Jawāhirul Ikhlīl of Abīl Azharī.

2. Commentaries on Ibn Abī Zayd's Risāla, such as Abīl Azharī's.

3. Commentaries on Ibn Āsim's Tuhfatul Hukkām (also known as the Āsimiyya), especially by Mayyāra, Ibn Abdul Salām's Bhaja and al-Tawādī.

4. Ibn Farḥūn's Tabsiratul Hukkām.

5. The Mudawwanā-al-Kubra.

6. Al-Qarāfī's Furūq and other works.

These works contain the various texts (nusūs) by the original authors, the commentaries by the various Commentators who have elaborated on the authors with their own observations, and the observations of others as well. In some cases there may be further elaborations of the elaborations, and so on.

Although in theory the general rule, in all the Schools, is that the Usūl are the Qur'ān, the Sunna, Ijma and Qiyās,[6] in that order, in practice resort is seldom had to either the

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6. See Ibn Farhūn, op.cit. Vol. I, pp.56,57. See also the discussion on this in Schacht : The Origins of Muhammadan Jurisprudence, Oxford, 1959, p.1; Coulson : A History of Islamic Law, Edinburgh University Press, 1964, Chapter 6; also Conflicts and Tensions in IslamicJurisprudence, Chicago University Press, 1969, Chapter 1, especially pp. 3 and 4.

Qur'ān or the Hadīth (the record of the Sunna) for an authority to back up a legal decision. Taqlīd -reliance on such texts as those enumerated above and similar texts - has reached a point where the texts have become the law par excellence.[7] However, the fact that reliance on these texts is the accepted practice does not render either unnecessary or irrelevant the question on what juristic basis we can rely on them and the writings of other jurists as the authorative exposition of the rules of the Shari'a covering the entire gamut of legal activity.

Ibn Farḥūn, in his Tabsirat, discusses the sources of law,[8] and we can glean the answer to the above question from that discussion. According to him, the law to apply is to be found in the Qur'ān, then the Sunna, then Ijmā. Ijmā of the Companions, he says must be relied upon; so, too Ijmā of the followers of the Companions.

However, where the Companions disagree in their views on any matter, or where the matter did not at all receive their

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7. This is an unavoidable histor9cal development which the Shehu criticised. See his Hidāyat-ul-Tulūb, p.3 (f.n.3 above). And see Adawī's exposition in his Commentary on al Khirshī's margin : al Khirshī, Sharh alā 'l Mukhtasar al-Khalīl, Cairo, 1308, A.H., p.140. See also Coulson : Conflicts and Tensions where he points out that Islamic law, in its developed form is a jurists' law, p.8.

8. Ibn Farhūn, op.cit. Vol. I, pp. 56-7.

consideration, what is to be done ? In the latter case, qiyās - analogy - the last of the sources, is to be resorted to; analogy implies exertions by the Muqallid himself, deriving guidance from the principles and the policy of the Shari'a, so far as he can ascertain these; but in the case of disagreement amongst the jurists, a Muqallid is required to follow the Mashhūr - the dominant view of the School, but the Mujtahid is not confined to this.[9] However, since the vast majority of administrators of the law are (and have almost always been) Muqallids, we need only be concerned with the way the Muqallid is required to deal with the situation. As far as the Mujtahid is concerned, it is sufficient merelyto observe that to qualify (as a Mujtahid) a person is required to know practically everything there is to know in and about the law, from all its sources.[10] And, it seems, even then such a person may not necessarily qualify.[11]

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9. Ibid, p.57. See also al Quarāfi : al Ihkām fī Tamyīz al Fatāwā 'an al-Akhām wa Tasarrufāt al-Qādī wa'l Imām. Edited by Abu Ghuddah, Aleppo, 1967, p. 84.

10. Ibn Farḥūn, ibid, p.59, where al faqih ... bin Samāriy gave a fatwā on this

11. Ibid. See where even Ibn al Qāsim is said not to have been a Mujtahid and the example of Mujtahids given as Muhammed ibn al Mawwāz, al Qadī Ismāīl and Ali Muhammed ibn Abī Zayd (p. 59). And see Qarāfī, op.cit. p. 29, where he says if a muftī is a muqallid "as is the case in this age of ours he is like a tongue of his Imām, an interpreter of his heart."

The Muqallid, then, must follow the view of the Imām of the School - if one had been expressed; if two or more than two views have been expressed by the Imām (or attributed to him) the latest is to be followed.[12] There is no right to choose another view if Mālik has expressed his.[13] If there is a conflict or doubt as to which is Mālik's view, then the one related by Ibn Qāsim is the authorative one and the doubt is thereby resolved.[14] This opinion - that the Imām's view must be followed - is Ibn Hājib's, which Ibn Farḥūn endorses.[15] Two other opinions, however, have been recorded by Ibn Farḥūn (a) that a Muqallid is not obliged to follow the Imām's ruling; and (b) that in fact he may do so only if, after his own exertions, he has arrived at the same conclusion on the matter and not otherwise.

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12. Ibn Farḥūn, op. cit. pp. 59-60.

13. Ibid. But this appears to be only Ibn Farḥūn's and Ibn Hājib's views. There are many instances where views are related of Mālik and others and the latter are preferred by the learned relators. See what Mālik himself is reported to have said : "I am a mortal susceptible to being right and wrong. Study my opinions - if they conform to the Book and the Sunna, follow them leaving out what does not conform to these (two sources)" - quoted by Adawī in Khirshī, op. cit. p.140. See also : Couson : The State and the Individual in Islamic Law, International and Comparative Law Quarterly, Vol. VI, Jan, 1957, 49 at p. 59.

14. Because, says Ibn Farḥūn, he had been in the company of Mālik for over twenty years (op. cit. p. 60). And see Adawī's view in support of this - Khirshī, op. cit. p. 140.

15; See f.n. 13.

Without disagreeing with these two views, Ibn Farḥūn merely explains that they only apply to a learned Muqallid who has the capacity and ability to examine the various views expressed by the people of the School and to discern those of them that are based and rest on the fundamental rules and principles of the Imām of the School. A "bare muqallid" (muqallid al-batat) is required to adopt the Mashhūr.[16]

Where neither Mālik nor Ibn Qāsim express any views on a matter and there are conflicting opinions, the view supported by stronger arguments is the one to choose even if it is only supported by a minority of commentators.[17] This is Mālik's own view.

In conclusion, we may observe that as a result of historical developments, in Northern Nigeria as elsewhere in the world, what one may call the official doctrine (that the Qur'an and the Sunnah are the primary sources and it is only when the problem is not covered by them that resort is to be had to Ijmā and Qiyās) has been modified in practical application. In practice, it is the books of the earlier jurists

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16. Ibn Farḥūn, op. cit. p.60.

17. Ibid p. 63. See the discussion on this by Ibn Rāshid and Mundād.

that people content themselves with - with no reference to the primary sources - on the firm belief that these contain the authoritative interpretation of the Qur'ān and the Sunna and that they record the Ijmā of the leaders of the School.

Where the views of the earlier jurists (the authorities) are in conflict in any given matter, the Mashhūr view is to be adopted and followed. The Mashhūr is, according to some, the view supported by the strongest arguments; according to others, the one supported by the largest number of jurists.[18] On no account should the choice of which to take be conditioned by the desire to pander to some unworthy inclination.[19] In practice, however, the choice of which view to follow is not guided by the fine analytic approach Ibn Farḥūn and others have prescribed. In Northern Nigeria the view is that you cannot fault a choice of any view within the School whatever the motives for the choice adopted.[20] And the effect of the saying ascribed to the Prophet - that "difference of opinion ... is a boon from Allah" - which has been whittled down considerably by the attitude taken above, is allowed full rein.

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18. See the discussion in Ibn Farḥūn, op. cit. pp. 63-4.

19. See the strictures of Ibn Sahal on this - Ibn Farḥūn ibid, p. 66. And see al-Qarāfī : op. cit. p. 79.

20. This again is due to historical reasons. There is no official guidance to the courts, and the Grand Khadi is of the view that provided the decision of a court rests on some authority, no matter how weak, it may not be reversed.

On the question of the authenticity of the contents of the books - i.e. the question why they are regarded as authentic statements of the views of their alleged authors,- Qarāfī takes the view that

> "famous books are, on account of their notoriety, far away from fraud and falsehood." 21

Ibn Farḥūn says they have acquired their authenticity by their antiquity and the improbability of fraud (tadlīs) entering them.[22] Both Qarāfī and Ibn Farḥūn and others compare legal books with books of other branches of knowledge, like language, grammar, and medicine.[22a] Their argument is that if you can rely on books of medicine, say, as being authentic even though there is no other direct proof of their authenticity, than their antiquity,[22b] so must you rely on ancient law books. If you repudiate either or both, public interest suffers.

This is undoubtedly a practical solution, but the analogy is far from happy. Medical and other scientific works are amenable to empirical testing. Soo, too, with most rules of grammar. Legal texts are not capable of this kind of

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21. Kitābul Ihkām, op. cit. p. 262 and quoted in Ibn Farḥūn op. cit. p. 69.

22. Ibn Farḥūn, op. cit. p. 68.

22a. Qarāfī, ibid; Ibn Farḥūn, ibid.

22b. See, e.g. Qarāfī, ibid, where he says such works are handed down through the hands of udūl.

scrutiny. And it does not help the argument to point out, as Qarāfī does, the importance of language and grammar - being "the basic tool of the law".[23] (The conclusion alluded to by Qarāfī, here, is that since in the case of language and grammar books, antiquity has been equated with authority, and since these two are the basic tools of the law, then law books must also be judged in the same way.) Fortunately, this thesis is not a discussion on Usūl, and the matter may be left there.

Appointment of judges under the Shari'a.

To come back to the question of appointment of judges under the Shari'a : first, it is a settled principle that the office of judge is a part of the functions of the ruler (the Imām - the Calif - the state) who may exercise it himself or delegate it to somebody else.[24] Sheyk Abdullahi of Gwandu, in his Diyāul Hukkām, says that the Imām

> "is a shepherd over all the people, but he cannot do everything by himself and is therefore compelled to appoint nā'ibs (deputies) ... the first (of these deputies) are the judges whose duty it is to adjudicate between people and settle their disputes involving their lives, property and honour." 25

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23. Ibn Farḥūn, ibid, p. 69; Qarāfī, op.cit. p. 262.

24. See Ibn Āsim: Tuhfat ul Hukām, Abdul Hamid Hanafi Publication, Cairo, (n.d.) p.3. Mayyārā: Commentary on the Tuhfat ul Hukām, Cairo (n.d.) Vol. I, p.10. Ibn Abdul Salām, Kitābul Bhaja, Othman Tayyeb Publications, Kano, Northern Nigeria, n.d.) Vol. I, p. 16. Ibn Farḥūn, op.cit. pp. 26, 21. See also Coulson : The State and the Individual in Islamic Law, op.cit. at pp. 57-8.

25. Sheyk Abdul Lahi : Diyā'ul Hukkām, Haliru Binji's Hausa translation published by the Gaskiya Corporation, Zaria (n.d.) Northern Nigeria, p. 22.

Thus, according to Sheyk Abdullahi (who, incidentally, in matters of Qaḍā, relies heavily on Ibn Farḥūn's Tabsira) it is a niyāba from the Imām. According to the Shehu Usman b Fodi[26] it is a duty incumbent upon the Imām to appoint judges who must apply the Shari'a. According to him, the Imām is under an obligation to appoint qualified and competent judges; the judges are under the obligation to apply the Shari'a and the public are under an obligation to obey the judges. Ibn Farḥūn[27] quotes al Māzari as saying that the appointment of judges is of two kinds : one by the Imām (or one of his lieutenants on his behalf), and the other by the leaders of the community, who may appoint one of their number in cases of necessity where the Imām cannot be contacted to appoint.

In short the position may be summarised thus : first, it is a compulsory requirement that there shall be state officials having judicial powers and exercising the same to settle disputes. As a general rule these are judges specifically appointed for this purpose. Secondly, the power to appoint the judges and the power to define their jurisdiction is vested in the Imām - who, indeed, primarily unites in himself all the

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26. Wathīqat, op.cit. p. 240.

27. Ibn Farḥūn, op.cit. p. 21.

powers and functions of the State. As Tyan puts it, one of the principal concepts of Islamic Public Law is that

> "the entire structure of the Islamic state is constituted by a series of delegations and representations." 28

All power, he continues, is vested in the Imām who delegates it to others who act as his representatives. Thirdly, it has now become the practice (one may say a convention which has hardened into the status of law) that Imāms appoint judges giving them the ordinary judicial powers and functions. Historically it was the Calif Umar who was the first ruler to appoint a full time paid judge - Shurayh. He also appointed Abul Mūsa al Ash'ari.

The appointment to the office of judge may be by the Imām himself or by another official on the Imām's behalf. The modalities differ from one time to another and from one place to another. But the general practice appears to have been, in former times, that the Imām only appointed the Qādil Qudāt (the Chief Justice). The other judges were appointed by either the Qādil Qudāt or the provincial governors. In Northern Nigeria the practice used to be, by and large, as the Shehu Usman recommended :[29] every Emir appointed the Chief Justice (called

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28. Tyan : Histoire de l'Organisation Judiciaire en Pays D'Islam, Leiden, E. J. Brill, 1960, p. 100.

29. Kitābul-Farq, op.cit. p.560. He was here approving a practice of other califs in history as recorded by al-Suyūtī in his Tārikh-al-Khulafā.

in Hausa Alkalin Alkalai) who in turn appointed other judges in the rest of the provincial towns. This had been the practice until very recently.

The instrument of appointment must state the jurisdiction, both territorial and subject matter, of the appointees. This however may be understood from the customary practice of the locality. The important thing is that the appointee (and the public) must know the extent of his jurisdiction.[30] Ibn Farḥūn says that the mode of stating the jurisdiction as well as the extent of the jurisdiction depends on the customs of each area. He quotes, with approval, the opinion of Ibn Qayyīm that

> "The conditions governing appointments to offices and the extent of their jurisdictions are to be understood from the words used, the attitudes of the appointors and the custom of the place. This is not a matter on which the Shari'a legislates. What may belong to the jurisdiction of the Army Commander at one time or in one place may belong to the jurisdiction of the judge at another time or in another place." 31

Jurisdiction in this context means both territorial jurisdiction and subject matter jurisdiction. As far as the latter is concerned, an

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30. See Ibn Farḥūn, op.cit. Vol. I, p. 21. See also Ibn Abdul Salām, op.cit. p. 18.

31. Ibn Farḥūn, op.cit. Vol. I, p. 18; and see Vol. II, p. 142. See also Sheyk Abdullahi, op.cit. p. 30.

appointee may be given charge of a specific geographical area or a specific town or part of it. As for the former, the appointee may be given full judicial powers or some only of these (specified) or full judicial powers plus other duties - for example to superintend the public treasury. However, there is the problem of what "full judicial powers", or what we may call the general (or ordinary) jurisdiction, comprise. Local custom, again, is crucial in determining this; but there are a few theories advanced on what, for want of a better term, one may call "the minimum content" of the office of a judge. Sheyk Abdullahi quotes Ibn Jazzi's[32] view that the jurisdiction of the office of a judge includes ten matters, as follows :

i. Settlement of disputes either by ṣulḥ or by adjudication.

ii. The suppression of ẓulm (and ẓālims) and the helping of the wronged and rendering rights unto their owners.

iii. Establishing the hadds and the rights of God.

iv. Dealing with homicide and bodily injuries.

v. Superintending the property of orphans and "patients" and the appointment of proprietory guardians for their property.

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32. Sheyk Abdullahi, op.cit. p. 30. Ibn Farḥūn, op.cit. Vol. II, p. 142.

vi. General superintendence over the awqāf.

vii. Execution of waṣiyyas.

viii. Contracting into marriage women who have no walīs (or whose walīs have wrongfully and maliciously refused to act).

ix. General superintendence over the general welfare of the people.

x. Enjoining the good and prohibiting the evil.

Although not all of these are judicial or quasi-judicial matters (certainly v, vi and viii-x are not judicial matters), the judge, according to this theory, is nevertheless under a moral/legal obligation to attend to all of them except those items specifically excluded from his jurisdiction.[33]

Qarāfī's view is that the judge has no jurisdiction in hudūd and has no obligation in respect of execution of his judgements and orders.[34] Ibn Farḥūn disagrees with this view.[35] Ibn Sahal, on the other hand, says his jurisdiction is

> "the widest of all jurisdictions, covering all matters great and small ... except those matters specifically reserved." 36

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33. See Sheyk Abdullahi, op.cit. pp. 29-30.

34. Kitābul Inkām, op.cit. p. 162, and quoted in Ibn Farḥūn op.cit. p. 17. And see also Al-Qarāfī's Furūq Matbaat Dār Ihya-el Kutub-el Arabiyya, Cairo, 1346, A.H., Vol. 4, p. 44.

35. Ibn Farḥūn, op.cit. p. 17.

36. Quoted in Ibn Farḥūn, op.cit. p. 18.

Ibn Amīn al Qurtabī says the jurisdiction covers all matters except tax collection.[37] Ibn Farḥūn, after discussing the various views on the subject, concludes by saying:

> "the matter depends entirely on the custom of each locality." [38]

This, it is submitted, is the best approach, especially if it is remembered that ultimately it is in the hands of the Imām to determine what the jurisdiction is going to be. Whatever the general jurisdiction is, it is, without a doubt, within the competence of the Imām to enlarge or curtail it, just as it is within his competence to define, or rather confine, the law the judge is to apply.

The question whether the appointor can restrict the judge in the law he applies is also the subject of debate among the authorities in the School. Al Tartūsh deplored the practice, then current among the rulers of Qurtab, of inserting a clause in the contracts of appointment of judges requiring them to confine themselves to the view of Ibn al-Qāsim whenever the view covered a matter.[39] He said this was gross ignorance

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37. Ibid, p. 18.

38. Ibid, p. 18.

39. See Ibn Farḥūn, op. cit. p. 57.

on the rulers' part, since the correct view was not necessarily to be found in any one particular text. Ibn Farḥūn disagrees with the criticism and, commenting on this view of al Tartūsh, said that this was only tenable in his (Tartūsh's) day

> "when there were many learned Mujtahids - since he was a contemporary of such (eminent and learned) people as Abdul Birr, al Bajī , Iyaḍ., etc."
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> "These and their like" adds Ibn Farḥūn "are lacking in our time from east to west." 40

What is more, he continues, Sahnūn had once adopted a similar practice when he appointed a person who "was amongst those who listened to some of the Irāqians".[41] He imposed on the appointee a condition that he was to judge according to the Madinese views and according to them only.

Another issue within the problem of jurisdiction is the question of delegation. Can the judge delegate some of his functions to another person, to exercise them throughout his area of jurisdiction or all his functions throughout a part only of the territorial jurisdiction ? Ibn Farḥūn mentions three possibilities in the matter :[42] first, if the

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40. Ibn Farḥūn, op. cit. pp. 57-8.

41. Ibid, p. 58.

42. Ibid, pp. 53-4. See almost identical views by Khalīl's commentators Dardīr and Dasūqī in Hāshiyat-al-Dasūqī alā 'l Sharh-al-kabīr, el Seūd and Tayyeb, Kano, Northern Nigeria (n.d.) Vol. IV, p. 133. Khirshī, op. cit. p. 143.

Imām prohibits him from delegating, then that is the end of the matter - he cannot delegate to anyone. Secondly, if he is permitted to do so, then, again, the position is plain - he may do so. Thirdly, if the contract is silent on the point, (and - presumably - there is no local custom or precedent) then, if he is the Imām's direct appointee, he can only delegate if he is prevented from exercising the office personally by illness or absence. Otherwise - if he is well and in the area of jurisdiction - then he cannot appoint a deputy to act for him. This third view is the view of Ibn Mājashūn, Mutarrif and Asbagh.[43] Ibn Farḥūn disagrees, saying that even if he is the Imām's direct appointment, and even though he is in good health and within the jurisdiction, he is under no obligation to go on a circuit throughout the jurisdiction. He may, instead of going on a circuit, appoint deputies throughout the area. This, according to Ibn Farḥūn, is the Mashhūr. Sahnūn,[44] on the other hand, takes a more extreme view: such a judge, according to him, can only delegate if he obtains the prior approval of the Imām - even if he is ill or absent. If he delegates

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43. Ibn Farḥūn, ibid, p. 53; Khirshī, op. cit. p. 143.

44. Ibn Farḥūn, ibid, p. 54; Khirshī, ibid.

without this prior approval, then the deputy's decisions may not be executed - unless the judge himself adopts them and gets them executed as though they were his decisions.

He can also appoint deputies on an ad hoc basis - for example to decide a particular case.[45]

As this delegation/deputising is only an agency, the deputy's authority expires either on termination by his principal or on the principal's death, unless the deputation was with the Imām's consent - express or implied, specific or general.[46] Secondly, the deputy need not have all the qualifications required of the judge (see below) but only in respect of the business he is given charge over - e.g. mīrāth.[47]

What restrictions are imposed on the Imām (or another appointor on his behalf) in the choice of a judge ? The rule is that to choose a person who satisfies the requirements of the Sharī'a, he is required to be guided not by his personal desires and whimsical inclinations, but by public interest.[48] Calif Umar is reported to have said that an Imām who appoints

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45. Ibn Farḥūn, ibid, p. 54.

46. Ibn Farḥūn, ibid, p. 55. See also Dārdīr, op. cit. p.133.

47. Ibn Farḥūn, ibid, p. 54.

48. Ibn Farḥūn, ibid, p. 24.

unqualified people from nepotism and favour, will share in the appointees' misdeeds. But if he chooses the right people he shares in their rewards and has no share in their faults and shortcomings.[49]

Qualifications for judicial office.

What are the qualifications required of a candidate for the office of judge ? There are the shurūṭ of sihha - the conditions of validity - and those of kamāla which it is desirable that the candidate should possess. On the former, the sihha conditions, Iyaḍ enumerates ten, the lack of any of which renders the candidate unqualified for the job, and his appointment (subject to the rider below) and decisions of no effect.[50] The candidate must be a sane, free, learned, male Moslem, who must also be an adl adult and possessed of the senses of sight, speech and hearing.[51] Iyaḍ says that lack of the first five qualifications (Islam and sanity, and

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49. Ibn Farḥūn, ibid, p. 24.

50. Ibid, p. 24. See the requirements and the discussion in Mayyāra, op.cit. pp. 11-2, and Ibn Abdul Salām, op.cit. p.18. Ibn Āsim leaves out ilm in his list - p.cit. p. 3 and see f.n. 60.

51. Ibid p. 24. See Khirshī's requirements, Khirshī, op.cit. pp. 138-9, where ilm again does not appear to be a sine qua non. See also Dardīr, op.cit. p. 130.

being learned, male and free) renders the whole thing void - both the appointment and the decisions. But lack of the last five renders the appointment bad but decisions given should be confirmed if right and the appointee deposed.[52] Both Ibn Farḥūn and Sheyk Abdullahi quote with approval these ten qualifications and discuss the validity of appointing a person lacking in some of them, for example a fāsiq or a child.[53] However, the one condition that excited a great deal of argument and discussion is the requirement of ilm - that the candidate should be learned. All the other conditions are agreed upon almost universally (though note Mālik's despairing note below).

Among the many advocates of the first view - that it is a necessary condition, of sihha - are Ibn Farḥūn and Ibn Rāshid and Ibn Shās.[54] Ibn Farḥūn says on the requirement of being learned :

> "it is not permissible to appoint a jāhil. (Nor, according to Ibn Shās) a Muqallid - except in cases of necessity".[55]

He quotes other jurists' views that the condition is only one

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52. Ibid. This is also Asbagh's view, as reported by Adawī - see Khirshī, op.cit. p. 138.

53. Ibid. And see Sheyk Abdulahi, op.cit., p. 31.

54. Ibn Farḥūn, op.cit. pp. 24-5. Ibn Rihāl who has discussed the different views at length also comes down on the side of the requirement of ilm - see Mayyārā, op.cit. pp. 12-3.

55. Ibid, p.25, and Khalīl says "it is harām (forbidden) to appoint a jāhil ... " see for example Khirshī, op.cit. p. 139.

of kamāla, and dismisses it as an odd, weak view which is "far from right". The judge, according to Ibn Farḥūn, needs, more than anyone else, to be learned.[56]

It cannot be argued that a jāhil judge can seek and obtain the counsel of the learned and judge according to what they collectively advise him. Tho this argument, says Ibn Rāshid,

> "we reply that he (the judge) is enjoined to seek their counsel anyway, even if he is learned ... If he is a jāhil, and their views differ, he would be left confused. (Besides) he may be appointed in a place where there are no learned people and in such a case he would be guided by nothing other than his own whims and caprices ..." 57

And Abu Umar reinforces this view by saying that it is not proper to have a jāhil asking counsel because being ignorant he cannot assess the value of the different views he may be given and one should not be allowed to decide on the basis of hit or miss. Finally, even Mālik, who despairs of hope of finding a fully qualified person "in this day and age"[58] says two qualifications are essential - knowledge and piety. Ibn Habīb says that if an ālim cannot be found, then a person of piety and aql (common sense) may do.[59] Ibn Āsim simply states that ilm is not a necessary condition, but only one of kamāla.[60]

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56. Ibid, p. 25.

57. Ibid, p. 25.

58. Ibid, p. 27. See also the Mudawwana, op. cit., p.144.

59. Ibid, p. 27.

60. Ibn Āsim, op. cit., p. 3. cf. the opposite view of Khalīl, f.n. 55 above.

Ibn Abdul Salām says that this is the view of Ibn Zarqūn as well.[61]

The difficulty about all these qualifications and what renders the whole issue of qualifications and the discussion on it rather a sterile academic exercise is the lack of any method of deciding whether a candidate is qualified. He must never seek the office. To do so disqualifies him for it ipso facto.[62] Not only that. Anybody who is approached may refuse, and is even encouraged to run away from the country and escape the awesome and burdensome responsibility of the office.[63] A number of instances are cited, with complete approval, of learned people who had either refused the office or had had to be forced to accept it under threats and duress.[64] In these circumstances it is difficult to see how the Imām can choose the right person. Thus, idealistic principles of academic fuqahā and the practical needs and realities of life

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61. Ibn Adbul Salām, op.cit. p. 20.

62. Ibn Farḥūn, op.cit. pp. 15-16, where he quotes the Prophet to that effect. See also (p.16) where Umar refused to appoint an applicant to the office because he applied for it. The Shehu, Kitābul Farq, op.cit. p. 564.

63. Ibn Farḥūn, ibid, pp. 12-13, where Mālik is quoted to that effect. Also, see Mayyārā, op.cit. p.10, and see also Khalīl's view in both Khirshī, op.cit. p.141, and Dardīr, op.cit. p.131.

64. Ibn Farḥūn, ibid, where the example of Sahnūn is cited.

are at variance. These latter are well recognized by the Fuqaha themselves who make exceptions to the principle. Thus there are cases in which a person is enjoined to seek the office and accept it, and other cases in which it is recommended that he should seek and accept it and yet others in which there is nothing wrong with his doing so.[65]

The sigha of appointment - the formalities. These may be either plain straightforward words or by implication which must be plainly understood. It may even be in writing but then the writing must be proved to have been authentic.

The contract must contain two compulsory clauses (or two things must be mentioned if it is not in writing) : the appointee's territorial jurisdiction, and the subject-matter jurisdiction. And the appointor must have learned of the appointee's competence before he appoints.[66]

Apart from the shurūt of sihha - the conditions of validity - there are other requirements - the conditions of kamāla. These are numerous and comprise all qualities of moral

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65. Ibn Farḥūn, op. cit., p. 16. See also p. 30.

66. Ibid, p. 22.

probity, uprightness and incorruptability.[67] There are also rules of etiquette the judge is, on appointment, required to follow. These are designed to ensure very high standards of conduct and to ensure that the dignity of the office is maintained and the judge's reputation unsullied. He is, for example, required to avoid the company of bad and lowly people, to avoid using such public facilities as public baths (and toilets), to refuse any gifts from anyone unless they are close relatives. He is also not to accept invitations to parties unless they are to celebrate a marriage - and even then unhesitating acceptance of any food offered there is regarded as infra dignitatem.[68] He should not visit anybody apart from his appointor.

As for the appointee's acceptance, he may decline unless he is the only person who unites in himself all the qualifications in the area. In such a case the office becomes obligatory on him.[69] Appointment by non-adl ruler had also

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67. See Ibn Farḥūn, ibid, pp. 23-8, where Calif Umar's famous letter to Abū Musa al-Ash'ari is quoted in full. See also pp. 31-4.

68. Ibn Farḥūn, ibid, p. 31. See the general discussion of these ḥamāla provisions in Dārdīr, op. cit. p.132; Khirshī, op. cit. p. 141; Mayyāra , op. cit. pp. 11-3; Ibn Abdul Salām, op. cit. pp. 19-21.

69. Ibn Farḥūn, ibid, p. 15.

been the subject of discussion. According to Ibn Farḥūn - who refrained from taking a definite position on the matter - two views were hald by (a) Abū Muhammad and (b) Ibn Farūkh.[70] The former said it was not permissible to accept the office and the latter it was. The two sought Mālik 's opinion on the matter and he opined that the former was right.

Officials of the Court : Under the Sharī'a, the judge chooses his assistants, and he must have at least the following :-

a. A scribe. He must faithfully and accurately record all that happens between litigants in the Court in the nature of pleas, evidence, arguments and submissions. There is no qualification requirement, except that he must, according to al Matītī, be adl.[71] Others add aql and unimpeachable character. According to al Mawwāz he need not be learned in the law - though others, again, say he should at least know the rules concerning scribes. However, the judge may be compelled by circumstances to employ a non-adl. In such a case, he

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70. Ibn Farḥūn, ibid, p. 21-22

71. Ibn Farḥūn, ibid, p. 32.

must keep a watchful eye on him and not delegate anything to him. Ibn Farḥūn quotes Ibn Shās. as saying that it is not even necessary that he should be adl.[72]

The position of scribe is an important one since it comprises both the work of the judge's secretary and the Court's registrar. Whatever writing is involved the scribe may do it for the judge, and there are quite a few administrative matters to be dealt with by the judge (as will be seen below)[73] in matters of writs, correspondence between judges for the transfer of cases, recording the cases and the (documentary and other) evidence.

b. Interpreters. An interpreter's is a necessary office, and it is a condition that they be adl and have all the qualifications required of witnesses. One suffices though some, likening interpreters to witnesses, say there must be two, competent males. Sahnūn, e.g., says the translation of one single translator or of a woman (or a non-adl) whose evidence is inadmissible is not valid.[74]

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72. Ibn Farḥūn, p. 32.

73. Chapter IV, below.

74. Ibn Farḥūn, ibid, p. 32.

c. The udūl : The Shahāda institution grew up, according to Tyan,[75] because of the twin reasons that (a) documentary evidence is looked upon with disfavour and (b) ordinary witnesses have always been regarded as suspect. As a result of these two things an institution - like that of "notaries public" - grew up. The essence of the institution was the recognition by the judge of the reliability of an individual whom the judge believed to have satisfied the rules of adāla and was therefore considered a trustworthy and competent witness. Such a person could then always testify before the judge without having, as it were, to bring references to vouchsafe his competence.

A third reason, it is submitted, should be added to the two above suggested by Tyan, and that is the desire of the authorities to try to ensure, as far as possible, a perfect machinery that would facilitate the trial of cases without involving the judge in too much active participation in the process of deciding the case.[76] (This matter of the ancient authorities'

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75. See Tyan, op.cit., Chapter 4 Section v, paragraph 1, especially pp. 237-239.

76. See also Milliot's view that it was the desire of the ancient authorities to direct the attention of the angry (and possibly violent) loser of the case away from the judge. Milliot : Introduction a l'Etude du Droit Musulman, Paris, 1953, p. 731.

desire to ensure a passive role for the judge is discussed below.[77])

The existence of the udūl class did not stop a mashhūd alaihi (the person against whom the evidence is given) from challenging the competence of an adl witness nor did it stop a mashhūd lahū (the person for whom evidence is given) from calling a non-member of the shuhūd class to testify for him.

d. Muzakkīs : The importance of acting only on the evidence of reliable witnesses was responsible for the growth of the institution of muzakkīs. The judge, who had to act on the evidence of an adl, and who did not know everybody and therefore could not possibly know whether a particular witness was adl, had to resort to the muzakkīs. These were the trustworthy people on whose information as to the adāla (or otherwise) of a witness the judge had to rely. They were also required to keep the judge informed on the continued adālā or otherwise of the udūl.[78]

e. The bailiffs (āwān and ghulāms)[79]: who help the Court in two, among other ways, by bringing the defendants or serving

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77. See Chapter V below.

78. Ibn Farḥūn, op.cit. Vol. I, p.32. Also see Tyan, op.cit., Chapter 4.

79. Ibid, p.33.

them with the Court's process and by executing the decisions of the judge.

f. Conciliar members : These are on an ad hoc basis and it is up to the judge to invite whom he pleases to assist him by shāwara on any particular case.[80]

The present position

The historical sketch of the "native courts" in Northern Nigeria has already been given.[81] The law and practice regulating the establishment of the Courts has also been given.[82] Only the administrative procedure whereby the provisions of the law governing the establishment of the courts and appointment of its personnel need be dealt with here. When they are put alongside the procedure laid down by the Shari'a, as discussed above, it will be found, it is submitted, that the present position in Northern Nigeria, substantially, accords with the requirements of the Shari'a.

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80. Ibid, pp. 33, 37; Mayyārā, op.cit. p.13.

81. Chapter I, Part 2, above.

82. Ibid.

Establishment of the Courts and appointment of Judges.

i. The former practice, under the Native Courts Law,[83] when it was the Provincial Commissioner who had the Chief Justice's present power to establish the courts was as follows :

a. In the case of Emirs' and Chiefs' courts the initiative for the appointment of the Emirs came from the "Provincial Secretary" of the Province.[84] He applied to the Minister of Justice, who considered the application and passed it on to the Gorvenor with his comments. The Governor then, if he was so advised, made the appointment by signing letters of appointment - returning them to the Minister of Justice, who sent them on, one to the Provincial Secretary and another to the Chief or Emir so appointed. The appointment took effect on the day it was made by the Governor.[85]

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83. Now replaced by the Area Courts Edict, 1967.

84. There was a Provincial Secretary in each of the 13 Provinces in Northern Nigeria. He was the most senior Administrative Officer and was in charge of the Province. On this procedure, see Burnett Notes (obtained from the High Court of Justice, Kaduna, Northern Nigeria).

85. See Burnett Notes, op.cit. Cf. the Shari'a procedure, above.

b. Alkalis and other court members : Whereas in the case of Emirs' courts it was the Governor who appointed, in the case of other courts it is the N. A. or the Public Service Commission who did. In the majority of the courts it is the N. A. which would make the appointment by warrant sending copies of the warrant together with the appointee's curriculum vitae to the Minister of Justice, who considered it and approved or disallowed it. The effective date was the date on which the Minister approved the appointment. The other native courts staff - the administrative staff - were N. A. employees appointed in accordance with the N. A. Staff Regulations.[86]

ii. The procedure now is much simpler since all the courts are under the Chief Justice and all the personnel are public servants appointed by the Public Service Commission on behalf of the Governments of the various States, and subject

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86. Ibid. The Native Authority Staff Regulations govern the conditions of service of all N. A. employees.

to the disciplinary control of the Commission. They are appointed in accordance with the rules made by the States' Ministries of Establishments governing the schemes of service of the various Departments of Government. In the Judicial Department (the administrative head of which is the Chief Registrar) the alkalis and court members are graded into Area Judges of various grades (Principal, Senior and Area Judges) and "court members". Rules on the requirements on qualifications are made by the Ministries of Establishments in consultation with the Chief Justice and the Chief Registrar. Appointments to the junior rungs of the judicial ladder are made after considering the qualifications and competence of the candidate and sometimes after he has been interviewed by the Public Service Commission. At such interviews the Chief Registrar who represents the Chief Justice attends as a member of the panel and helps in assessing the qualifications and professional competence of the candidates. Often the Chief Registrar is himself represented by the Chief Inspector, because in most cases the appointments are to Shari'a courts and therefore the Chief Inspector is more competent to assess the candiates.

Appointments to the higher rungs of the ladder are usually by promotion of the junior alkalis or members of the Courts. This, again, is done by the Public Service Commission on the recommendation of an ad hoc committee known as the Judicial Advisory Committee, which is composed of the Chief Justice, the Senior Puisne Judges, and a Shari'a Court of Appeal Judge in cases where the appointment of a Shari'a judge is to be considered.[87] Once appointed, however, the Judicial Department takes over the responsibility of posting, transfers, and other deployment of the judges. Thus, both the establishment of the courts and the deployment of the courts' personnel are within the jurisdiction of the Chief Justice. The Public Service Commission is only an appointing agent of the Government.

Two observations should be made here. First, the Shari'a recognizes only single judge courts. It is specifically

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87. Although this committee is purely ad Hoc and of advisory capacity, the Shari'a Court of Appeal Justices - the highest rung of the Shari'a judicial ladder - are dissatisfied with its composition. See the Minutes of their Conference of December 1971.

stated that two judges may not be appointed for one Court acting in concert each depending on the other's decision. Ibn Farḥūn mentions this rule and says that this does not prevent appointing two or more judges for the same town or locality provided their jurisdictions are distinctly separated and are incapable of demarcation disputes. This requirement of single judge Courts[88] does not, however, preclude the presence of conciliar members of the Courts whose role is purely advisory. Indeed, it is one of the requirements that the judge should always consult other learned people in deciding a case - even though the final responsibility for the decision is his.[89]

Under the present Northern Nigerian laws this Sharī'a requirement, so far as Sharī'a Courts are concerned, is fully complied with. All the Sharī'a Courts are single judge Courts. (What is more, the other Courts - non-Sharī'a native courts - though the majority of them are conciliar Courts presided over by presidents who must act according to the majority decision, in "Moslem cases" they are required by law to hand the matter

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88. See, e.g., Mayyāra ., op. cit. Vol I, p. 12; see Khirshī, op. cit. p.144; Dārdīr, op. cit. p. 134.

89. See f.n. 57 above.

over to a single member learned in the Shari'a. What constitute "Moslem cases", to be sure, have been rather restrictively and unsatisfactorily defined.[90])

Secondly, the Shari'a has no hierarchy of Courts, and therefore no appellate tribunals as such. It is true that there have for a long time in history been Qādil Qudāts (or Qādil Jamāa) who resemble the Chief Justices of present day.[91] But the Qādil Qudāts were more of wazīrs of the Sultan in charge of the judiciary and judicial administration.[92] They even appointed other qādis and gave them their jurisdiction, and even defined the law those other qādis were to follow.[93] But they were not appellate tribunals in the modern sense. It is also true that the Shari'a recognizes that it may sometimes be necessary to reverse[94] the decision of a qādi (which may be

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90. See Chapter I, part 2, above.

91. See, e.g. the Shehu's Kitābul Farq, op. cit. p.560

92. See the discussion of their position in Tyan, op. cit. Chapter 3, Section 1, paragraph 2.

93. See Ibn Farḥūn's remark about Sahnūn having had occasion, when he appointed a Hanafi jurist, to require him to judge according to the Mālikī School, op. cit. p. 23.

94. See, e.g., al Qarāfī, Kitābul Ihkām, op. cit., pp. 76 and 128.

done, to be sure, by himself or by another). It also recognizes that complaints, valid complaints, may be made against the qādī (as well as other state functionaries) and the Imām is enjoined to review such complaints and to redress them. But none of these had been thought to necessitate the creation of an Appeal tribunal.

The present Northern Nigerian position is thus a clear departure from the strict theory of the Shari'a since there is a hierarchy of courts with final appeals either to the Shari'a Court of Appeal or to the High Court (Area Courts Appeals) Division.[95] (Appeals lie from the lower Area Courts to the Upper Area Courts from whence appeals go either to the Shari'a Court of Appeal in Moslem personal law matters or to the High Court in other matters. This latter court is composed as shown above of two High Court Judges and a Shari'a Court Judge).

Another departure from the Shari'a theory in Northern Nigeria is in the composition of the Shari'a Court of Appeal itself - its being a multi-member court with a Grand Khadi,

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95. See above, Chapter I, part 2.

three Deputy Grand Khadis and six other Sharī'a Judges.[96] It is in three Judicial Divisions, with a Deputy Grand Khadi and two Judges in each Division; appeals are heard by two or more Judges.

As far as officers of the Courts are concerned, these have been dealt with earlier.[97] All the functionaries required by Sharī'a are there in every Court, except the udūl and the muzakkīs .

Conclusion.

The Sharī'a requirements in respect of the constitutional structure of the Court are simple enough: there must be the judge who might be an appointee of the ruler (or appointed on behalf of the ruler). It may be one judge who may appoint others as his nāibs or deputies, or the ruler may appoint a number of judges. The judge must have certain specified qualifications. There must be other officials of the Court; the

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96. See above, Chapter I, Part 2, p.

97. See above, Chapter I, Part 2, p.

scribe, the interpreter, the udūl, the muzakkīs and the bailiff and other āwān. All these are under the orders of the judge.

The present practice in Northern Nigeria in these matters, as reflected by both the legislation on the topic and the actual practice in the Shari'a courts, is, as shown above, in substantial conformity with the requirements of the Shari'a. In some aspects the legislation has been designed to satisfy the requirements of the Shari'a, and in others the practice corrects the legislative shortcomings on the matter. However, there is one area where what one may call "the Shari'a lobby" considers improvement is called for in order to bring the practice in line with the Shari'a.[98] That is in the appointment of the judges. According to them it is unsatisfactory that the Chief Justice is the one who has de jure influence in the appointment of judges even though there is a Grand Khadi. They suggest that the Judicial Advisory Committee should be reconstituted to include Shari'a Court of Appeal Judges as a matter of right. It must be pointed out, however,

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98. See f.n. 87 above.

that the present system of co-opting members of the Sharia Court of Appeal, on an ad hoc basis, is designed to maintain the unity of the judiciary while at the same time ensuring maximum satisfaction of the Sharia requirements.

Part 2.

Venue and Sessions.

Venue.

The territorial jurisdiction of Courts, under the Edicts, has been discussed.[1] The Shari'a provisions on the matter have also been discussed[2]: they (the latter) provide that the jurisdiction of the judge, both ex ratione loci and ex ratione materia must be clearly defined - or understood from local customs and usages.

In the modern Northern Nigerian system of judicial organisation, the High Court is organised on a State-wide basis. In the days when Northern Nigeria was a single polical entity, there was a High Court for Northern Nigeria, which was staffed by a single Bench comprising the Chief Justice, the Senior Puisne Judge and seven other judges.[3]

1; See Chapter I, Part 2, above.

2. See Chapter II, Part 1, above.

3. See High Court Law, S. 4 and Constitution of Northern Nigeria, S. 50 (2).

The Chief Justice, the Senior Puisne Judge and all the other judges (i.e. the Bench) have jurisdiction throughout Northern Nigeria. The inferior branch of the "English" judiciary was also organised along the same lines. There were "District Judges" and Magistrates who had territorial jurisdiction throughout the territory of Northern Nigeria.[4] The Shari'a Court of Appeal was also in the same category of territorial jurisdiction. The native courts on the other hand, as has been discussed above, have very restricted jurisdictions - confined to the area specified in their warrants.[5]

The High Court and the District Courts, though they have jurisdiction throughout Northern Nigeria, were organised in "Judicial Divisions" - three for the High Court and two for the District Courts[6] - with two High Court judges in each Division and a number of Magistrates and District Judges. A plaintiff had to start proceedings in one of the Judicial Divisions, and the question of venue concerned the right Judicial Division.

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4. See District Courts Law S. 8 and the Criminal Procedure Code S. 9.

5. See the Native Courts Law (now repealed and replaced by the Area Courts Edicts) S.3.

6. The High Court Law, S.68 (1), and the High Court (Judicial Divisions) Order in Council, Laws of Northern Nigeria, 1963, Vol. IV, S.2; see also District Courts Law, ibid, S 3 and the District Courts Direction, ibid, Vol. IV, S.2.

The position today is the same as above, except that there is in theory a High Court with all its paraphernalia and a Bench of Magistrates and District Judges for each of the six Northern States. However, all the Northern States still remain organised in three Judicial Divisions, and the question of venue remains unaltered.

Rules of venue are primarily directed to the litigant, and under the High Court Law of Northern Nigeria, these rules - which are in the High Court (Civil Procedure) Rules - are made by the Chief Justice.[7] Order VII of the Rules deal with venue as follows :-

a. All suits relating to land shall be commenced in the Judicial Division where the land is situated.

b. Suits relating to contracts are to be commenced and determined in the Judicial Division where the contract ought to have been performed or where the defendant resides.

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7. Ibid, S. 116 (1) (a), (3).

c. All other suits are to be commenced and determined in the Judicial Dvision where the defendant resides or where he carries on business. If there are more defendants than one, residing or carrying on business in different Judicial Divisions, the action may commence in any one of them, but the Court may order the transfer of the case to another Court if that will ensure the most convenient arrangement for trying the suit.

d. However, if a plaintiff commences a suit in the wrong Division, it may still go on unless the Court directs otherwise or the defendant objects "to the jurisdiction".[8] When such objection is raised the Court may, if satisfied of the alternative, order the case to be transferred, or it may retain it and continue the hearing. This is entirely at the discretion of the Court and its decision is not subject to appeal.[9]

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8. High Court, Civil Procedure Rules, Order VII, r.5.

9. Ibid, r.6.

It has also been noted that there may be more than one Area Court[10] in each area - or locality - whether it is a town, a district or a part of a large town. The territorial jurisdictions of each of such courts (which are in the same geographical areas) may be coterminous. The only difference may be in the extent of their subject-matter jurisdictions and powers. Thus, there may be four courts in a locality, for example a large township. Two of them - Grade III (the lowest grade) courts, the third a Grade II and the fourth a Grade I. The two Grade III courts may each have jurisdiction only in a specified area of the town; the Grades II and I each having jurisdiction throughout the town. The Rules (of Civil Procedure) provide that an action is to be commenced in the lowest court having jurisdiction in the matter. Therefore, although each of these courts may have "subject-matter" jurisdiction and power to try a particular cause, the plaintiff must choose the correct venue - the correct court - the court having jurisdiction in the area where the defendant resides or where the cause of action arose. In the above example, therefore, if the defendant resides in Area B of the township, and the cause

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10; See Chapter I above. The Area Courts include Shari'a courts.

of action arose in that area, and the claim is one which a Grade III Court can entertain, then the plaintiff must institute proceedings in the Grade III Court of Area B and not the Grade III Court of Area A, nor the Grades II or I Courts. If a plaintiff chooses the wrong venue, the Court may, either on the application of the defendant or on its own motion, transfer the case to the right venue.

Sessions.

The rules about sessions deal with the times and places at which the Courts sit. It is - under the Edicts - primarily up to the Court (subject to the provisions of any law) to determine the times and places to hold sessions "as may be necessary for the convenient and speedy dispatch of" its business.[11] The Chief Justice has the power to interfere in this and direct that sessions be held at such times and places as he deems fit, but as noted above he very rarely interferes.[12] The rules as to venue and sessions under the Area Courts legislation have also been noted above.[13]

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11. The Area Courts Edicts, S. 7.

12. See Chapter I, Part 2, above

13. See Above. Chapter I, Part 2.

The Shari'a Position

What are the Shari'a provisions in regard to venue and sessions ? The first point that strikes one is that in these pre-trial matters, and indeed in most other procedural matters, the court centres around the judge. Unlike the present-day position, thelitigant goes more to a particular judge than to a particular court. Secondly, the rules are obviously designed to cater for the convenience of the litigants (which also appears to be the aim and philosophy of the present-day legislation on the matter); and thirdly, the rules regarding venue are, we may note, primarly directed to the litigant - especially the plaintiff - and those about sessions are directly primarily to the court, i.e. the judge.

The Shari'a rules on sessions are almost identical with the rules of the Edicts.[14] They provide for the sessions of the court throughout the year, except what we may call "public holidays".

As the rules are directed to the judge and centre round him, they include also his place of residence.

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14. See Chapter I, part 2, above.

The basic aim of the rules may be stated in the following two propositions :

i. The judge, in his judicial capacity, must be easily accessible to the public and readily available at specified times of the day. Because of this requirement even his place of residence is required to be located in the centre of the town/locality to facilitate easy access to him at all reasonable times.

ii. He must hold sessions of his court every day of the year and he has no right to set aside a day to himself for his rest and shut the public out of his court. To do so, according to Ibn Farḥūn,[15] would be tantamount to interference with the rights of the people - which he may not do without just cause (ḍarar). He is, however, entitled to short holidays, and he is otherwise entitled to draw up his sessions timetable according to his entire discretion.[16]

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15. Ibn Farḥūn, op.cit. Vol. I, p. 35.

16. Ibid. See also Mayyāra, op.cit. p. 14; Ibn Abdul Salām op.cit. p. 23. Mudawwana, p. 144; Dardīr, op.cit. pp. 137-138.

The rules may conveniently be divided into two : those dealing with the place where the Court sessions may be held and those dealing with the times during which the sessions may be held.

a. Place where the Sessions of the Court may be held.

The generally held view is that the judge may hold the sessions of his Court anywhere he pleases, including his home, provided the place is sufficiently publicised.[17] However, in towns where there are Jum'a mosques, the mosque is preferred because of its central location and its accessibility (due to the absence of any barriers - physical and psychological - to it).[18]

If the judge elects to sit at home then he has to keep its doors open to all and (in that part of it where he holds his sessions) people must be allowed freely to come and go without any let or hindrance.[19] If, on the other hand, he

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17. Ibn Farḥūn, op. cit. p. 34; Mayyāra.., op. cit. p. 14; Ibn. Abdul Salām, op. cit. p. 23; Mudawwana.., p.144.

18. Ibn Āsim, op. cit. p. 3., Mayyāra.., op. cit., p.13; Ibn Farḥūn, op. cit., p. 34.

19. Ibn Farḥūn, ibid.

elects to hold his session in the mosque, he should sit in its courtyard and preferably follow the practice of Sahnun (which Sahnūn recommends) of keeping a special place in the mosque as a sort of regular "Court-house".[20]

Against the general view . . . stated above there are two powerful dissenting voices in opposite directions. On the one hand Calif Umar is reported to have been opposed to the idea of holding Court sessions at home. He so much disapproved of the practice that he threatened to have Abul Mūsā al Ash'arī's house burnt on him if he did not desist from holding Court sessions therein.[21] On the other hand, a Shafi'ī view has been adopted by some jurists and they oppose holding Court sessions inside a mosque. To hold sessions in the mosque, they say, (a) is unfair to people of other faiths because it puts them at a disadvantage; and (b) the (inevitable and unavoidable) boisterous noises and arguments of litigants, and the probable risk of people with wet and unclean feet entering the mosque for the purpose of litigation, are tantamount to profanation of the sacred precincts of the mosque.

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20. Ibn Farḥūn, op. cit., p. 35; Mayyāra , op. cit. p. 14.

21. Ibn Farḥūn, op. cit. p. 34.

Because of these reasons, Umar ibn Abdul Azīz[22] ordered his judges - especially Ibn Abdul Rahmān - not to sit in the mosque.

Apart from the two dissenting views above stated there is a universally recognised exception to the general rule of the judge's untrammelled freedom to choose where to hold his Court sessions. He may not hold Court sessions on the roads and pathways.[23] The Court may visit a road or any pathway (or any other place) for the purpose of viewing "the locus in quo", but not to hold sessions there.

All these rules and views stated seem to indicate one thing : that there should be a special Court house so conveniently located in the locality to facilitate easy access by the public. If the area of the judge's jurisdiction is large and he has to visit it on circuits then there should be Court houses in several places. These need not be built for the purpose, but they may be buildings for other uses, but used by the Court when it visits the locality.[24]

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22. Ibid, p. 35.

23. Ibid, p. 36.

24. This is the practice in Northern Nigeria today.

Times of sessions.

The general rules may be formulated as follows :

Rule 1. The Court shall be in session throughout the year except on public holidays.

Rule 2. The sessions shall be held during such hours of the daytime as the judge may think fit, provided that he may not appoint hours which, in all the circumstances, are likely to cause inconvenience and hardship to the public or any section thereof, and provided that the judge shall give the public due and adequate notice of the hours so appointed.

These two rules, it is submitted, cover the whole ground covered by the various views expressed by the classical jurists on the topic, as can be seen from the following.

First, there is complete agreement among the jurists that it is within the absolute discretion of the judge to appoint the hours of day when he shall be sitting.[25] Imām Mālik is reported to have recommended the judge should draw up a

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25. See f.n. 16 above.

timetable and stick to it.[26] He should not sit, according to Mayyāra,[27] throughout the day "as if he were a merchant", and should not sit for very long hours according to Mālik[28] "lest he does too much and makes mistakes" or dozes off during sessions.

Secondly, he is not to choose hours that may cause inconvenience to the public. This proviso derogates from the absolute nature of his discretion. Obvious examples are given of inconvenient hours. Thus, he may not sit during the night, during the early morning or, where Christians or Jews are involved, during their Sabbath days. Some even suggest that he may not sit on Fridays.[29]

He may not sit on public holidays - the Eids (i.e. the Eid days, the days before and after the Eids); the Haramayn days, Maulid days and other days of public rejoicing or mourning.[30]

Thirdly, the general rule is that he must hold sessions throughout the year and failure to hold sessions is tantamount to infringement of people's rights. However, he is

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26. See Ibn Farḥūn, op.cit. p. 36.

27. Mayyāra, op.cit. p. 14.

28. See Ibn Farḥūn, ibid; Mudawwana, p. 144.

29. See Ibn Farḥḥūn, ibid.

30. Ibn Farḥūn, ibid; Mayyāra, p. 14; Ibn Abdul Salām p. 23.

entitled to take short holidays - e.g. to visit friends and relatives. He is, also, barred from sitting whenever he is in a state of physical or mental discomfort - either from disease, anguish or even sheer fatigue or excess of hunger or thirst.[31]

Finally, he must notify the public of the times (and, of course, places) of sessions.[32]

Venue.

Whereas the rules concerning sessions of the Court are directed primarily at the Court, the rules on venue are, though directed to both the Court and the litigant, mainly directed to the litigant - especially the plaintiff.

It may be that both litigants live in the same town, and the subject-matter of the dispute is also situated there (where it is a tangible thing - like real and personal property). In such a case no problem of venue arises under the Shari'a. (Under the present day Northern Nigeria rules of Court there is always the minor question of which is the

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31. Ibn Farḥūn, ibid; Mudawwana., ibid.

32. Ibn Farḥūn, ibid; Mayyāra., ibid.

lowest Court in any locality having jurisdiction in the matter. Under the Shari'a such a problem does not arise at all except in the very marginal sense that the judge in the district may not have full powers and jurisdiction. This is discussed below).

It is possible, however, that the litigants live (and are ordinarily resident) in different towns/localities, and the subject-matter of the dispute may itself be located in the place of residence of one of them or it may be somewhere else not in the place of residence of either of the litigants. It is here that the question arises - where may the suit be commenced and determined ? Can the plaintiff sue in the Court of the area where he lives or must he go to the Court of the area where the defendant lives ? What if the defendant is absent from the place where he ordinarily resides - does the plaintiff have to search for him and sue him wherever he finds him ? To answer these questions and to solve the problems posed by these questions is what the rules on venue are about. Be it noted here, however, that the last question (the absence of defendant) though it poses a problem of venue, shades off into the separate problem of "default procedure" (see Chapter III below).

Where parties are ordinarily resident in different places.

There is a good deal of disagreement among the authorities on the question of the right venue in cases involving conflict in geographical jurisdictions. Unlike the question of times and places of sessions of court, there is here no general agreement on any one view. All the various (and varied) views on the topic, however, are conditioned by the considerations of the location of one of the four factors involved in the issue - the defendant, the subject-matter of the litigation, the witnesses and the plaintiff, in that order of importance. It would perhaps be best to reduce the various views to the two simple propositions that they really boil down to; and then explain and discuss them and suggest an alternative set of rules. The propositions are :

i. As a general rule, the action must be commenced and determined in the court of the area where the defendant ordinarly resides if, at the time of the commencement of the proceedings, the defendant is in the area.[33] (This is the dominant view; but the dissenters say that the action must be commenced

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33. Ibn Āsim, op. cit. p.4 Mayyāra., op. cit. p. 21. Ibn Abdul Salām, op. cit. p. 23.

and determined in the Court of the area where the subject-matter of the dispute is located - irrespective of where the litigants reside.[34])

ii. If the defendant happens to be absent from his place of residence at the time of the commencement of the proceedings, then (1) if the dispute is one touching the defendant's zimma., the plaintiff may sue him wherever he finds him. But (2) if the dispute concerns a tangible/corporeal property (ayn), the plaintiff can only sue the defendant where he finds him if the property (the subject-matter of the dispute) is also situated there or is in the defendant's actual physical possession at the time. (3) If the ayn is neither in the place where the defendant is nor is it on the defendant, the plaintiff can only sue the defendant in his place of ordinary residence - irrespective of where the defendant is, or where the subject-matter is or

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34. See Mayyāra., op. cit., p. 21, where he discusses the other views. See also Ibn Abdul Salām p.32. Ibn Farḥūn op. cit. pp. 83-84.

is situated. (Here the dissenters say the plaintiff can sue an absentee defendant wherever he finds him no matter what the dispute is about or where the subject-matter is or is situated.[35])

These propositions represent the sum total of the main views on the subject by the commentators. Thus, for example, Mayyāra[36] relates a "responsa" of Īsā who was asked concerning the case of a litigant who lives and ordinarily resides in Qurtab but owns a house or some other tangible property in Jian. A Jianese wants to sue in respect of that house or property in Jian. Can the Jianese sue in the Court of the judge of Jian ? Īsā replied that the Jianese cannot do so, and must go all the way to Qurtab and sue there even though the subject-matter is located in Jian and even if all the witnesses are in Jian. Ibn Habīb, who subscribes to this view, reports that it was held by Mutarriff as well, and is also Ibn Qāsim's view.[37] On this there is little disagreement - though there are some who say even in this kind of case the

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35. Mayyāra , ibid; Ibn Abdul Salām, ibid.

36. Mayyāra , ibid, p.22; see also Ibn Farḥūn ibid.

37. Mayyāra , ibid; Ibn Farḥūn ibid.

proper venue is where the property is situated, and others say where the witnesses are, and yet others say where the plaintiff is - or elects to sue. But the dominant view is the one above and, according to Iyaḍ,[38] is the one followed in Madīna.

Ibn Farḥūn quotes another but similar example given by Ibn Habīb in his Mukhtasar-al-Wāḍiha.[39] A Madinese has a house in Makka , and a Makkan claims ownership and wants to sue the Madinese for the house. Can he (the Makkan) sue in Makka ? Ibn Habīb quote Ibn Mājashūn as saying that the proper venue is where the subject-matter of litigation is located - in this case the house in Makka . The judge of Makka should hear the case of the plaintiff - his evidence and submissions - and allow the defendant time to come either in person or by a representative and make his reply to the case of the plaintiff. This view, according to Faḍl ibn Salma, was held by both Sahnūn and Ibn Kināna, but the latter adds a rider : that if one of the judges is a jā'ir (unjust) then it is the adl judge's court which is the proper venue.[40]

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38. See Ibn Farḥūn, ibid.

39. Ibid, pp. 83-84.

40. Ibid.

Ibn Habīb then goes on to point out that both Muṭariff and Asbagh (and he Ibn Habīb himself) disagree and hold the view that it is the court having jurisdiction where the defendant lives that is the proper venue - quite irrespective of where either the plaintiff lives or the subject-matter of the dispute is situated.[41] They, however, propose a partial solution to the inconvenience and difficulties that will be caused by rigid adherence to their view (or, indeed, to any of the other views).[42] They suggest that it is one of the rights of the plaintiff to start proceedings "in his judge's court" (in the example above in Makka) and prove his case there. The judge of Makka then sends the records of the proceedings of the case as proved before him to the judge of Madīna, the plaintiff himself or his accredited representative taking the records to the judge of Madīna. If the judge of Madīna is satisfied of the authenticity of the records so brought, he summons the defendant and informs him

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41. Ibid, p. 84; see also Mayyāra, op.cit. p. 21.

42. See Ibn Farḥūn, ibid.

of the contents of the records and asks him if he has "a way out" of the case - i.e. a defence to the claim. If he has none, the judgement of the court of Makka is to be executed.[43]

If, however, the plaintiff goes straight to Madīna and starts proceedings there - in the proper venue - and states that both the subject-matter and the witnesses are in Makka, the Madīna court must give him a letter to the judge of Makka asking the latter to hear the case fully and send the records to the court of Madīna.[44]

Though this is the view of most of the authorities (notably Muṭariff, Ibn Habīb, Ibn Qāsim and Asbagh) in cases where both the defendant and the ayn (the corpus of the subject-matter) are located in the same place, they disagree where the two are separate and the defendant is absent from his place of ordinary residence. According to Asbagh, were the Madīnese defendant to be away in Makka, and were the Makkan plaintiff to meet him there in Makka and decide to litigate the matter there, he has the right to

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43. Ibid.

44. Ibid.

do so and the defendant cannot stop him.[45] Asbagh adds . :

> "whoever 'clings' to a man pressing a claim to any right, he may litigate thereon in whichever place he finds him if there are judicial authorities there, whether the corpus of the thing is there or not and whether their respective abodes are there or not." 46

Ibn Habīb is not prepared to go that far; he comments :

> "I subscribe to this (view) if the claim is in respect of a debt or something that appertains to men's zimma... But as for corporeal property, only if the subject-matter is also situated where they are." 47

This accords with Ibn Mājashūn's view that the venue is where the corpus is located.

Ibn Rihāl clarifies the issue by giving the various views.[48] He adds the view of others (unnamed) who say the proper venue is where witnesses are, and others say where the plaintiff is. This is the weakest view.

Having considered the broad range of the views on matters of venue one thing should be noted parenthetically. Because rules of Court centre around the judge (since there is no Bench of judges) the proper venue in any context means

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45. Ibid.

46. Ibid.

47. Ibid.

48. See Mayyāra ., op. cit. (marginal notes) p. 21.

the proper judge as well as the proper Court. Thus, even where the right Court to sue in may be in the place where the defendant is, if the judge lacks competence in the particular matter the venue shifts to another Court and judge.[49] For example, if the judge is jāir, according to Ibn Kināna , the case has to go to the adl judge. Now this may be an academic issue which cannot be applied in fact. However, it is a different matter where the judge's lack of competence is of particular application - where the rules of natural justice (one may call them) require another judge. If the plaintiff is a relation of the judge or a friend, or if the defendant is his enemy, clearly the judge has no competence in that particular case and therefore the venue shifts to another Court.[50]

How practically applicable are the rules that may be extracted from the above views - taking the convenience of the litigants and witnesses into account ? It is fair to say that any one of these views taken and acted upon by itself in isolation is bound to cause some injustice and inconvenience to the litigants. First, the dominant view - the defendant's abode. If both the subject-matter and the witnesses - or the

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49. See, e.g., Ibn Farḥūn, op. cit. p.85.

50. Ibn Farḥūn, ibid.

main witnesses - live somewhere else (especially if the plaintiff also lives with them) then clearly the defendant's residence is not the best place. And yet, unless the defendant happens to venture out and into the suitable place, he can only be sued "at home" - according to the dominant view. And even if he ventures out, unless he comes to the right place he cannot be "served with the writ" - e.g. if he is somewhere away from the corpus of the subject-matter.

Asbagh's view that (nothwithstanding anything said above) a plaintiff can sue a defendant wherever they meet is attractive enough; but the only difficulty is that it leaves the plaintiff at the mercy of fortune. What is required is a set of rules that makes it easy to bring them together without unduly burdening either of them.

Ibn Mājashūn's and Ibn Kināna 's view that the venue is wherever the matter is situated would appear to be even more attractive than the one above if the witnesses are also there. But it is not always that the two coincide.

In short, the most satisfactory solution is most likely to be achieved by a combination of the rules and parts of the rules. The result to aim at is a set of rules as to venue which is sufficiently flexible and gives to Courts

a lot of discretion to ensure that a case is tried in a court which, in all the circumstances of the case - especially the location of the subject-matter, of the litigants themselves, of the witnesses - is the most convenient. One may hazard the following rules as the best solution to the problem :

Rule 1. In causes and matters concerning land and other real property the case is to be heard and determined by the court having territorial jurisdiction over the area in which the land (the subject-matter of the dispute) is situated; provided that if in all the circumstances of the case another court is better suited to hear the case the court may transfer the case to that other court.

(Comment : in landed property disputes, the best venue is the location, because the witnesses are most likely to be there - the neighbours etc. - and the court may wish to go there itselve to view, for example, the boundaries. And in any case the proviso ensures that if the court is convinced either by one of the parties or on its own motion that the most suitable court is in locality X, it can transfer the case there.

Rule 2. In disputes on debts and other contractual matters the proper venue is the court having jurisdiction either where the defendant resides or where the contract was entered into or where the breach occurred, whichever is the most convenient, having regard to the distances, the nature of evidence and the witnesses involved in the case.
(Comment : this will enable any of the courts in any of the jurisdictions to either accept the case if it is convinced that it is the most suitable court having regard to all these matters or to reject it if it is convinced that another court is better suited to try it. It will be open to either of the parties to move the court to either accept the case or transfer it to another, named, court; or the court itself may do so on its own motion.

Rule 3. In any dispute concerning the administration of an estate of a deceased person, inheritance, or any claim against a deceased person or against the estate of the said deceased person, the proper venue is the court having territorial jurisdiction over

the area where the deceased person had his ordinary residence.

(Comment : this rule will cover any claim arising out of the death of a person, whether it is a claim to inheritance, or to recover a debt against him or against the administrators of the estate or by the administrators against the heirs, or to contest his will or any part of it. Clearly the best venue is not where he dies, but where he had his place of residence and ordinarily resided. However, where it is either the heirs or the administrators of the estate (on behalf of the estate) who wish to sue somebody else for a debt which that person owed the deceased (and which now accrues to the estate) this will be like an ordinary suit of an ordinary debtor in contract (and Rule 2 above applies.)

Rule 4. In all other matters either the court having territorial jurisdiction over the place where the cause of action arose or where the defendant resides - provided that if in all the circumstances of the case another court is more suitable and more convenient, that case may be transferred thereto.

(Comment : as in Rule 2 above.)

CHAPTER III

PARTIES

Parties to a civil action are, generally speaking, two individuals - a plaintiff and a defendant - each representing himself. But there are cases where one of the individuals concerned (or both) cannot appear and represent himself in the case before the court. This may be due either to a legal impediment - incompetence - for example an "infant" or a "patient" or "safīh"; or it may be that the individual concerned is unable to appear before the court at the requisite time, or, for any reason, he may prefer to be represented by abother person. Alternatively, it may be that there are a number of people jointly or severally liable or entitled in the same suit and they may wish to be represented by only one of them. The subject of parties may therefore be conveniently considered under two general heads :

1. Those cases where the person or persons actually making the claim against another or others (or resisting the claim made) is or are represented by another.
2. Those cases where the parties in the proceedings represent themselves.

Definitions.

In this, as in the previous chapters, the terms "plaintiff" and defendant" have been used for the sake of simplicity, and a word of explanation is here called for. They are not intended to represent the Shari'a terms "mudda'ī" and "mudda'ā alaihi" - terms fraught with much confusion, if not much difficulty, and which are fully discussed in the chapter on Da'awā.[1] For the purposes of these chapters, the terms "plaintiff" refers to the person who initiates the proceedings - the party who goes to the court and makes a complaint - or claim - against the other and thereby sets the judicial machinery in motion. And the "defendant" is the party summoned to answer the complaint - or claim - made against him.

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1. See Chapter IV, below.

1. Cases of representation by others.

(a). Persons suffering from lack of competence : "Infants" and Safīhs.

"Infants":

Under the general Nigerian law - following the English Common Law - an "infant", for the purposes of civil proceedings, is defined as a human beingbelow the age of twenty-one.

Under the Shari'a, an "infant" (not a Shari'a term) is a human being who has not attained the age of puberty and the maturity to make a prudent judgement (bulūgh and rushd). The actual age at which puberty is attained is a biological issue[2] and it differs from one person to another, although in the majority of cases physical puberty is attained between

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2. This is determined by physical indications, for example pubic hair or menstruation, or wet dreams. See Ibn Farḥūn, op.cit. Vol. I, p. 216, where he quo es Abī Zayd who says a 15-year old who has never had a wet dream does not qualify as a bāligh (for the purpose of giving evidence). See a fuller discussion of this issue in Umar Abdallah, Ahkām-al-Sharī'at al-Islamiyyā fī ahwāl al Shakhsiyyā, Alexandria, 1957, p. 527.

the ages of twelve and fifteen.[3] However, a child below the age of fiteen will normally be presumed to be a minor since such a child is not likely both to be physically mature and to be mature enough to make a prudent judgement. A young person of fifteen[4] and above will be presumed competent while one of eighteen[5] will only lack competence on grounds of hajr which has to be proved before the court, but not on grounds of minority.

Safīhs.

A "safīh" is a person who has attained the age of majority but who, because of his mental state,[6] is incapable

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3. See Ibn Wahab's view which contradicts Abī Zayd's and Qarāfī's on the necessity for the appearance of physical indications in a 15-year old before he can be taken to qualify as bāligh. See also Qarāfī's view that 18 years is the minimum age for bulūgh where no physical indications of majority appear - Ibn Farḥūn ibid. See also the Mudawwana op.cit. p.163; Umar Abdallah, op.cit. p.527, and Schacht, An Introduction to Islamic Law, Oxford, 1964, p. 124.

4. See, for example, Coulson, Succession in the Muslim Family, Cambridge, 1971, p. 217; Milliot, Introduction à l'Etude du Droit Musulman, Paris, 1953, p. 237. The Northern Nigerian practice, however, is to defer conclusive presumption of majority to age 18.

5. See Ibn Farhūn, ibid. But note that there are other conflicting views even here. See for example Umar Abdallah, ibid.

6. He may be an imbecile (ma'tūh), an idiot (safīh) or a lunatic (majnūn). See Umar Abdallah, op.cit. p. 522.

of satisfactorily managing his own affairs and is under interdiction and under the proprietary guardianship of another.[7] He cannot deal with his property and, as a general rule, contractual relations with him can only be validly entered into through the intermediary of his guardian.[8]

Proceedings are brought on behalf of either of these two above by their guardian - the infant's father or wasī-guardian and the safīh's proprietary guardian.[9] Where they are sued, the general rule is that in claims against them founded on contractual obligations, "the court may not hear a case against a person who is not bound by his admission".[10] And neither their admission nor their denial[11] of anything may bind them and "the court will not ask them concerning anything claimed against them".[12]

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7. Ibn Farḥūn, op. cit. Vol. I. p.133; Umar Abdallah, op.cit. pp.530-41; 545-51.

8. See Umar Abdallah, ibid; Coulson, Succession, pp.216-16; see also Ibn Farḥūn, op.cit. Vol. I. p.40.

9. Ibn Farhūn, op.cit. Vol. I, p.133.

10. Ibid.

11. The importance of denial of liability is discussed in Chapter IV below.

12. Ibn Farḥūn, ibid.

This is the general rule in contract - which is really more a rule of substantive law of contract than a rule of procedure. To this rule there is the exception that if the safīh's guardian gives him some property to engage in business with (for example for the purpose of training him or testing his competence), if he incurs liability in the normal course of that business, he may be sued thereon.[13] This is the dominant view. But he can only be sued in this case if the capital was supplied by his guardian and not by another person. If it is another person who supplied the capital, neither the safīh nor the other person is liable. Secondly, the plaintiff's entitlement to recover is restricted to the property in the hands of the safīh, and nothing more.[14] To prove the case, the plaintiff must prove the contract by means of witnesses who actually witnessed the conclusion of the contract : it would not suffice for the plaintiff to prove the safīh's admission (iqrār) of liability under the contract.[15]

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13. Ibid. This rule applies also to infants who have attained the age of discernment (tamyīz). See Umar Abdallah, op.cit. p. 525.

14. Ibid.

15. Ibid. See Chapter V, Part 1, below, for the importance of iqrār as proof of liability.

In claims founded on tortious or quasi-tortious (delictual) liability, for example trespass to the person or to goods, the plaintiff can sue and may be awarded damages from the property of the infant, or, as the case may be, the safīh.

The action against these persons is defended by their guardians who are entitled to Ìzār after the plaintiff has proved his case.[16] But the question arises : if an infant is sued and he has no guardian - i.e. neither father nor a waṣī guardian - can the court appoint for him an ad hoc guardian, what we may call "a guardian ad litem" ? Ibn Qāsim says this may not be done.[17] Asbagh says the court is under an obligation to appoint a guardian for such an infant; but it is to appoint for him a full-scale guardian, in charge of all the infant's affairs including the litigation against him before the court.[18] Asbagh apparently considers Ibn Qāsim's terse reply in the negative rather misleading since, as Asbagh points out, it is one of the court's duties to see that infants

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16. Ibn Farḥūn, ibid. For Ìzār, see Chapter V, Part 2, below.

17. Ibn Farḥūn, op. cit. Vol. I, p.134.

18. Ibid.

are not left uncared for. Asbagh's is the dominant view; but it is generally agreed by the authorities that a court may not appoint an ad hoc guardian who is dismissed at the end of the trial.[19]

Married women and femmes soles.

It may here be mentioned parenthetically that married women have full competence in matters of litigation. (They may, of course, choose not to appear by themselves before the court, and in some cases they are requested to appoint a wakīl (a representative) if their personal appearance may cause some distraction within the court.[20])

Even a father cannot sue for his married daughter without wakāla. If, for example, he gives his young daughter in marriage to a man who deserts her before consummation of the marriage, leaving her without nafaqa,[21] and if the father brings proceedings for the dissolution of his daughter's marriage on grounds of desertion and lack of nafaqa, the court will

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19. Ibid.

20. Ibn Farḥūn, op. cit. Vol. I pp44. Indeed, in some cases the judge is required to order the woman to appoint a wakīl.

21. Ibn Farḥūn, op.cit. Vol. I, pp. 143, 146.

not hear the case until he proves that he has been validly appointed wakīl by the girl. Or suppose a father wants to sue for his daughter's divorce on grounds of cruelty, he must, also, first prove his wakāla.[22] Without proof of wakāla the father has no locus standi in either of the cases.

The unmarried woman presents no problems here. She can either be an unmarried minor (or a safīh) who falls within the category of minors and safīhs generally, or she may be an adult and responsible and falls therefore in the category of responsible adults.

(b). Wakāla.

In the case of infants and safīhs under interdiction, it has been noted that the law requires their representation by their guardians. Fully competent persons, however, may be represented by agents of their choice.

Wakāla in litigation arises, as a general rule, out of an ordinary agreement of agency just in the same manner as other contracts of agency are entered into. It is an agreement between, on the one hand, the party to the litigation -

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22. Ibn Farḥūn, op.cit. Vol. I, p.143.

be he the plaintiff or the defendant - whom we may call the principal, and the wakīl (the agent) on the other. It is an agreement to the effect that, either for a consideration or otherwise, the wakīl agrees to prosecute the claim of (or to defend the action against) the principal.[23] He may be asked by the principal to admit so much of the claim, to deny so much of it, or, generally to handle the case in a manner decided upon by the principal. Or, he may be given free rein in the matter. This is the dominant view.[24] However, three points should be noted here.

First, there are some authorities who take the view that the court should only accept a wakīl in place of the actual party if he has been instructed to admit or deny or to do something specific (for example to admit and ask for time to pay) and not otherwise.[25] But this view does not find general acceptance and the court is required to accept a wakīl in place of a party provided the wakīl is not known to be a vexatious

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23. Ibn Farḥūn, op. cit. Vol. I, p.158.

24. Ibid, p.159. See a full discussion and a review of the authorities in Mayyāra, op.cit. Vol. I, p.131.

25. Ibid. Sahnūn, especially, was strict on this.

or frivolous litigant.[26] And once accepted (i.e. on proof of his wakāla - which may be done either by evidence or by the principal himself introducing the wakīl as his wakīl) his conduct in the litigation binds his principal;[27] his admissions (or denials) bind the principal provided they are made in the court in the proceedings.[28]

Secondly, the wakīl, once appointed, should with all reasonable speed press on with the litigation. If he represents the defendant, he should appear before the court to defend as soon as the plaintiff sues. If he appears for the plaintiff he should initiate proceedings within a short time of his appointment, otherwise the court may require the renewal of his appointment.[29] Sahnūn says the court must require the renewal of the wakīl's appointment from the principal if he fails to prosecute the action within two years of his appointment.[30] This Ibn Sahal considers too long a

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26. Ibn Farḥūn, op.cit. Vol.I, p.155; Mayyāra, Vol.I, p.131.

27. Ibid, p.154.

28. Ibid. Indeed some authorities go to the extent of making the principal liable for the wakīl's admissions made outside the forum. But this is a weak view.

29. Ibn Farḥūn, op.cit. Vol.I, p.155; Mayyāra, op.cit. Vol. I, p.135.

30. Ibid.

period and, according to him :

> "most of our Sheikhs consider the wakāla in continuance for a period not longer than six months at most." 31

After that period the wakīl can only proceed with the case after renewal of his wakāla by the principal.

Thirdly, although the principal can dismiss the wakīl at any time before the proceedings begin, the wakīl cannot be dismissed once the trial has actually begun,[32] (some authorities say he may not be dismissed after the other party has appeared before the court up to three times.[33]) unless he is guilty of collusion with the other party or he wilfully acts to the detriment of his principal in the case. Even before the trial begins, the wakīl may not be dismissed without cause if his wakāla is for a consideration.[34]

Finally, as pointed out above, the wakīl must prove his wakāla before the trial actually commences. If this is not done he has no locus standi in the case and his conduct

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31. Ibn Farḥūn, ibid.

32. Ibn Farḥūn, ibid, pp. 155, 156, 158. See also Mayyāra, opcit. Vol. I, pp. 135-6.

33. Ibid.

34. Ibn Farḥūn, op.cit. Vol. I, p. 158.

does not bind the principal.[35] Thus, if a person claims to be the wakīl of the plaintiff but does not prove the wakālā and is not asked to prove it by the defendant, the plaintiff is not bound by the outcome of the action. If the defendant admits his liability and pays the wakīl, the plaintiff can still recover from the defendant because the wakāla had not been proved.

(c). Quasi-wakāla (or negotiorum gestio wakālā)

Wakāla, it has been noted above, arises out of and is based on an agreement between the parties to it - the principal and the wakīl. But a person on his own motion (for example prompted by the desire to protect a right or some property of another who is absent) may wish to act for that other without a prior agreement. Such a person (whom we may call "negotiorum gestor" wakīl) may be a blood relative or a neighbour of the absentee owner of the right or the property in question. And he may (or may not) himself have some remote right or claim attaching to the property which he cannot legally press in his own name immediately.

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35. Ibid.

What happens in effect is that a person goes to the court and asks to be allowed to sue for and on behalf of another, and the issue is whether he may be allowed to do so. We may, following the general drift of the discussion of the issue by the authorities, conveniently consider the issue under three heads :

i. claims on behalf of a parent or a child;

ii. claims on behalf of a blood relative or a neighbour; and

iii. claims on behalf of a total stranger.

i. Claims on behalf of a parent or a child.

We may observe that such a person has a stronger case than the other two in that he may have either an existing or a future right in the property of the mudda'i lahū (the principal). A needy father is entitled to maintenance by his son, and a young child is entitled to maintenance by his father,[36] and each has an undefeatable right to inherit the other.[37] This is not the case as regards the other two.

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36. See, for example, Umar Abdallah, op.cit. pp. 502-505.

37. Both rank as asaba vis-à-vis each other, and the father is also a "quota sharer". See Coulson, Succession, op.cit. pp. 41,42.

This fact seems to have been overlooked by the authorities and as a result though they permit the wakāla their pronouncements are very cautious indeed and an obvious lack of enthusiasm for negotiorum gestio wakāla seems to permeate their pronouncements.

Thus Mutarriff quotes Mālik as saying that "in certain circumstances" a person may be allowed to sue another for a debt due to his (the suer's) father without wakāla from his father.[38] Mutarriff then adds that such a person may only be allowed to do so if the father is near by - not far away. If he is near by and the case against the defendant is proved, the defendant pays into court (or returns the thing claimed into court) and the proceeds (or the thing itself) are kept by the court and the father given time within which to come and claim it.[39] If he comes within the time and claims, he is to be given the thing. If he fails to come within the time limit, or if he comes and says the defendant had repaid him (i.e. he has no claim against the defendant),

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38. See Ibn Farḥūn, op. cit. Vol. pp.140-142; Mayyārā, op.cit. p.139; Ibn Abdul Salām, op.cit. p. 124.

39. Ibn Farḥūn, op. cit. Vol. p.140.

then the defendant is to be given the thing back.[40] If, on the other hand, the father is absent and far away, then the son can only be allowed to claim for him on proof of wakāla from the father or on proof that he is in general charge of the father's businesss. Without proof of either of these the defendant cannot be sued.[41]

It is difficult to understand why in this example Mutarriff should insist that if the father is far away his son cannot, on the father's behalf, sue the debtor, but that he can sue if the father is near by. One should have thought that the other way round would be more logical, since if the father is near by the cases must be very few indeed where there is a pressing need to sue for him without contacting him first and getting a wakāla. Besides, with all the safeguards taken to keep the property out of reach of the son,[42] there is hardly any fear of the father's interests being put in jeopardy. The only explanation would seem to be the desire to discourage "busy-bodying".

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40. Ibid, p.141.

41. Ibid.

42. For example, the court keeps the property in safe custody until the father returns and claims it.

Both Ibn Habīb and Asbagh endorse Mutarriff's view;[43] but Asbagh differs from them in one aspect : the father's absence far away. According to Asbagh, if the son proves that the father is far away and has been absent for a long time, then his long absence is to be treated like his death. The defendant is to pay into court and the court keeps it for the father.[44]

Ibn Farḥūn cites as an example, a case which Mālik gave his opinion on. A man died in Qīrawān survived by a widow and a brother. The brother was away in Andalus and the deceased left some real and personal property in Qīrawān. The widow claimed that the property belonged to her and wanted to sell some of it. The deceased's absent brother's son petitioned the court asking to be allowed to prove that the property belonged to the deceased (and not to the woman). Mālik said if the judge was satisfied (i.e. if it had been proved before him) that the said deceased had actually died and that the brother (of the deceased) was alive, then in that case the brother's sone was to be allowed to litigate the matter

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43. Ibn Farḥūn, op. cit. Vol. 1 p.141.

44. Ibid.

against the woman. Anything proved to accrue to the brother should be kept for him by the court and not given to the son.[45]

ii. Claims on behalf of a blood relative or a neighbour.

It has been seen above that even a claim on a father's behalf, without express wakāla, is allowed only with hesitation and subject to conditions. It is little wonder, therefore, that other requests are considered with even greater caution and permitted with greater reluctance.

Your blood relatives and neighbours have certainly more justification in concerning themselves with your interests during your absence; but Mālik, without mincing words, says they may not sue for the absentee without wakāla.[46] He gave this opinion in answer to Ibn Ghānim who wrote asking his opinion on a case where a person applied to the court to be allowed to sue on behalf of an absentee, a cousin or neighbour, whose property in the hands of another person, is in danger of collapse, ruin or loss.[47] Ibn Farhūn, however, makes an

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45. Ibid.

46. Ibid.

47. Ibid. But see Dasūqī, op.cit. p.163, where a different view is given.

Exception. He says a brother or a neighbour cannot sue for such an absentee except in cases of a claim for a slave, an animal or clothes in the hands of another.[48] Here the application may be allowed because these three things are susceptible to disappearance, loss or change. One may well ask : why should the fear of possible loss in respect of these three justify making an exception to the general rule ? Ibn Ghānim's question arose out of a case concerning a dwelling house which it was feared might collapse; why, then, should it be a matter of great urgency to protect a gown from the possibility of "change" or loss but not a house ? No obvious explanation comes readily to mind and the best approach in the whole matter of "absentees", it is submitted, is Ibn Mājashūn's view. Without mincing words, he says he would not permit anyone to sue for another without wakāla, whether that other is his father, son, brother or neighbour, and whatever the claim may be for.[49]

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48. Ibn Farḥūn op.cit. Vol I, p. 141.

49. Ibn Farḥūn, op.cit. Vol. I, p.142. See other views in Mayyāra, p.139.

iii. Claims on behalf of others (total strangers).

Ibn Kināna is reported to have said that this should be left to the judicial discretion of the judge.[50] It is not surprising that Ibn Kināna is out on a limb on this. For, although practically any view one takes on any given topic there is likely to be some authority sho supports it, nevertheless if one juxtaposes Ibn Kināna's view with those of the others above mentioned, one can find no basis on which to support Ibn Kināna. Ibn Farhūn, who says this view is out of line with the views of Mālik's companions, quotes Ibn Qāsim as flatly contradicting Ibn Kināna and saying that if a judge were to be so ignorant as to allow such a stranger's application to litigate, then the whole thing is null and void and the outcome is of no effect whatever - either for or against the absentee.[51]

d. The approach of Northern Nigerian courts.

Section 28 of the Area Courts Edict provides that no party may be represented by an advocate. It also provides

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50. Ibid.

51. Ibid.

that a party may (at the discretion of the court) be represented by another; but the representative must be one of a number of enumerated persons (all of them close relations). The restriction of even the right of wakāla - which is unrestricted in the Shari'a - may be due to the desire to keep professional advocates out of Area courts.

The judges of the Shari'a courts themselves are not keen on wakāla. They prefer the parties to represent themselves if they are fully competent and generally permit wakāla only if there is a satisfactory reason for the party's failure to attend in person.[52] And even then the wakīl must be one of those enumerated in Section 28. This is their position with regard to express wakāla.

"Quasi-wakāla" is unknown to the Edict and the Rules made thereunder; but the judges - at least in theory - hold the view that they should permit it in certain circumstances and only on the plaintiff's behalf.[53] It should only be permitted, they say, if the plaintiff is far away and there is imminent danger (or its likelihood) of loss to him of his

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52. See Jibir Daura, pp. 5-6.

53. Ibid.

property. And even then he can only be represented by a near relative.

The judges are not always guided either by the Shari'a or the legislative enactments on these matters, and in many cases they simply use their discretion; but this often results in no substantial injustice in the cases.

A good example of a case where both the Shari'a and the enactments were ignored is the case of Muazu v Mijinyawa.[54] Muazu sued Mininyawa claiming (a) that he was the Personal Representative of a certain woman, W, who died survived by her husband and a full brother, Aliyu; (b) that W's husband was now also dead, survived by a son, Ibrahim; (c) that Aliyu (W's full brother), was now away in Misau in Bauchi Province (about 300 miles away from Zaria) and had been away from Zaria for the past 50 years; and (d) that the deceased woman, W, had left, among other things, a piece of land which was now in the possession of the defendant and had been in his possession for the past 16 years as a pledge for the loan of £4.00 which the defendant gave to the deceased, W.

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54. Case File No. 59/518/67, Chief Alkali's Court, Zaria, December 1967.

Muazu now wanted to redeem the piece of land and restore it to the heirs of the deceased on the basis of wakāla for Aliyu.

The court allowed his wakāla for Alliyu and allowed him to redeem the pledge (which, apparently, the defendant pledgee did not contest) by repaying the £4. 0. 0. to the defendant. It then ordered the land to be divided equally between Ibrahim, the deceased husband's son, and Aliyu, the deceased's full brother. The plaintiff Muazu was given Aliyu's portion to keep for him until he returned. Ibrahim took his portion on payment of £2. 0. 0. (reimbursing the plaintiff).

The court did not concern itself with the question on what basis the plaintiff claimed to be made a wakīl of the absentee Aliyu. Nor did it concern itself with the important question whether Aliyu was indeed still alive. The legislative enactments have been infringed here because the self-appointed wakīl does not come within the categories of people who may be appointed wakīls, and was not expressly appointed. The Shari'a rules have also been infringed in that there was no valid wakāla of any sort.

e. Representative actions.

i. These are cases where the person claims (or defends) on behalf of himself and others. Thus, an heir may sue for himself and other heirs, but if the case goes against him the others are not bound by the decision - unless they had expressly appointed him as agent. This is Ibn Mājashūn's, and the dominant, view.[55] But Ibn Salma says (and claims to be supported by Ibn Qāsim) that they are bound unless they base their claims on an altogether different case or different evidence.[56] If he wins, then he recovers only to the extent of his entitlement. The others' entitlements are to remain in the hands of the defendant who has full authority to deal with it as he pleases until the others claim it from him - or, (according to Ibn Habīb and Ibn Mājashūn) until their heirs claim it.[57] But Muṭarriff disagrees with the last part of this statement. He says if one of the heirs on whose behalf the original claim is made dies before he

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55. See Ibn Farḥūn, op.cit. Vol. I, pp. 143, 144.

56. Ibn Farḥūn, ibid, p. 144.

57. Ibid.

recovers his share from the defendant, his heirs cannot claim it on behalf of his estate, nor can his creditors be repaid out of that claim. In such a case, according to Mutarriff, it is necessary to reopen the whole case against the defendant.[58]

ii. What about claims against a deceased person ? This is the converse of the cases of claims by or on behalf of heirs, because when a person dies, whatever obligations or liabilities he may have contracted or incurred during his life, devolve upon his tarika (his estate). And his heirs claim the tarika - or the remainder of it - only after his liabilities have been extinguished.

However, the procedural steps in cases of claims against the deceased have a distinctive characteristic about them. Their rationale appears to be to guard against taking advantage of the deceased's death by unscrupulous claimants.

The plaintiff is required to prove that the deceased is,indeed, dead, to prove the number of his heirs (and also that they are all the heirs of the deceased) before he proceeds to prove his case. After that he must swear the "judicial

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58. Ibid.

oath" yamīn-ul qadā'ī.[59] This is an oath which must be sworn to by every claimant against a deceased, an absentee, an orphan, the awqāf ("pious endowments) or the Baiṭ-el-māl (the Treasury).[60] He has to swear that he has not been repaid the debt or any part thereof (if that be the case), neither by the deceased nor by any of his heirs; that the liability has not been extinguished or nullified in any other way, but remained binding on the deceased and, on the death of the deceased, it passed on to his tarikɯ and remains in existence up till the time of swearing the oath.

iii. Where there are a number of people who each have the same claim against one person, one can sue on behalf of himself and all the others. A good example of this is where cattle belonging to one person damage the crops in a large farm belonging to a number of people, or several adjoining farms beloning to several farmers. It should be noted that the question whether one person can sue for himself

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59. See Ibn Farḥūn, op.cit. Vol. I, pp.135-6; Dardīr, op.cit., p.162; Khirshī, op.cit. p 172.

60. Ibid

and others arises only where there is no express wakāla involved. And the issue, in such a case, is really whether the others are bound by the judgement. Thus, Ibn Farḥūn records that he had once asked Asbagh if such a case were to go against the plaintiff (who represents himself and others), is the court to enter judgement against the plaintiff alone or against all of them ?[61] Asbagh was uncertain and

> "once he said against them (all) and later said against him (the plaintiff-representative) alone. He said the judge should mention that the plaintiff sued for a group of people " -

and lost. If any one of those represented wishes to reopen the case and claim for himself alone, he can only do so if he bases his claim on a case entirely different from that previously made on his behalf.[62]

2. Where there is no element of representation.

The authorities proceed on the assumption that in the majority of cases the litigants are competent parties who

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61. Ibn Farḥūn, op.cit. Vol. I. p.144.

62. Ibid.

appear together before the court each appearing for himself, seeking the settlement of their dispute by the court.[63] However, in actual fact, in the majority of cases, it is the plaintiff who appears alone before the court and the first issue is to compel the appearance of the defendant.

The defendant may be within the same locality (town, village) where the court holds its sessions; or he may be outside the locality but within the court's territorial jurisdiction; or outside the court's jurisdiction altogether. If he lives outside the court's jurisdiction, then his case is governed by the rules of Venue (discussed above[64]). But if he goes outside the jurisdiction for a temporary purpose, then his case is governed by the rules on the process to compel the defendant's appearance (to be discussed in this Chapter).

The substance of the rules on process to compel the defendant's appearance under the Shari'a and under the

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63. Hence the great deal of discussion on how to determine who is the mudda'ī and who the Mudda'ā alaihi; see Chapter IV below.

64. Chapter II, part 2, above.

Northern Nigerian "Rules"[65] is very similar. The Northern Nigerian Rules have already been generally discussed.[66] Only their substance need be noted here - and it is as follows :

a. The plaintiff has to make a formal complaint in person (or by his authorized representative) to the court and if the court considers that his complaint discloses a cause of action, it shall issue a summons to the defendant asking him to appear and answer the claim.[67] If the complaint discloses no cause of action the court shall reject it and record the fact together with the reasons for the rejection.[68]

b. If the defendant refuses to answer the summons, the court may either have him arrested and brought, or proceed to hear the case as though he were present in the court and give judgement against him if the evidence warrants it.[69]

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65. I.e. the Area Courts (Civil Procedure) Rules, 1971.

66. See Chapter I, part 2, below.

67. Or. 2 r.6.

68. Or. 2 r.4.

69. Or. 9, r.3 and Or. 3 r.10.

c. If after the case has been heard in his absence the defendant appears and applies to have the judgement set aside he can only do so if he satisfies the court that there were good reasons for his failure to attent at the trial of the suit (and that he has a valid defence).[70]

The Shari'a provisions :

First, the plaintiff's complaint (da'awa) must be sahīh (i.e. it must be a proper complaint which discloses a legally enforceable cause of action). A sahīh complaint must satisfy certain conditions - for example it must be definite; it must not be a claim de minimis, etc. - which are discussed below under da'awa.[71]

Second, the plaintiff must, in some cases, introduce some evidence to make out a prima facie case against the defendant. This matter is the subject of a certain amount of controversy among the authorities.[72] Those who insist on the

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70. Or. 9 r.4.

71. See Chapter IV, below.

72. See Ibn Āsim, op.cit. p.4; see a discussion on the authorities in Mayyāra, op.cit. Vol. I, p.24; Ibn Rihāl, op.cit. p.24; Ibn Abdul Salām, op.cit. p.34; Dardīr, op.cit. pp. 162-4; Ibn Farḥūn, op.cit. Vol. I, pp. 86-88 and 134-135; Khirshī, op.cit. p. 172.

condition, base their view on the need to discourage frivolouse and vexatious litigation and to guard against compelling defendants to make long journeys to answer baseless claims.[73] Thus, Sahnūn insists that (in order to guard against such "baseless claims intended merely to annoy the defendant") the judge

> "may not issue a summons or in any way compel the defendant to appear until the plaintiff bring some (prima facie) evidence (shubh)" 74

in support of his claim. This is also the view of Ibn Āsim.[75] But others hold a contrary view. The two famous commentators on Ibn Āsim, Mayyārā and Ibn Abdul Salām, say it was not the current practice in their time to request the plaintiff to produce prima facie evidence before the defendant was summoned.[76] Khalīl takes a middle course : if the defendant is to be summoned to come from a long distance - "for example sixty miles" - then the plaintiff must make out a prima facie case against

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73. Ibid.

74. Ibid. See a review of the authorities and a discussion of the various views in Dasūqī, op.cit. p. 163.

75. Ibid, p. 4.

76. Ibid.

the defendant. This may be done by calling a signgle witness or by proof of some circumstantial evidence.[77] But if the defendant is not far away he may be summoned to appear without proof of shubh (prima facie case).

The debate on this matter seems to be only explicable by the fact that "Costs" did not play any significant part in procedure in those days. Indeed the only costs discussed at all by the authorities are the fees payable to the bailiff - the process server - if he is not on the payroll of the Treasury,[78] and the costs of transport and other expenses of the witnesses.[79]

If the plaintiff's complaint satisfies the conditions of sihha, the court sends the process server to summon the defendant if he lives within the court's locality or within "easy miles". If he lives away from the court's locality but

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77. Ibid.

78. The duty is primarily on the treasury; but if the treasury makes no provision for the 'āwān, the judge should, if he can. If he, too makes no financial provision for them, then the plaintiff must pay the fees for the service which he is entitled to have reimbursed by the defendant if the defendant is guilty of ladad. See Ibn Farḥūn, op.cit. Vol. I, p. 33; Mayyārā op.cit. pp. 25-26; Ibn Abdul Salām, op.cit. p. 36; Tawādī, op.cit. p. 36.

79. This is discussed below; see Chapter V, Part 1 below.

not really far away (" a one or two days' journey away") the court sends his a summons calling upon him to appear.[80] In each case he is to be allowed sufficient time within which to appear, either in person or by a representative or to pay up (settle up with the plaintiff).[81] If he lives really far away - either in terms of actual distance or because the road is unsafe - the court writes to some trustworthy people (amthāl) in the place where the defendant lives, asking them to settle the dispute either by ṣulḥ or by adjudication between the parties (i.e. making the defendant pay if he is found liable). If they fail to bring about ṣulḥ and they find the defendant liable and he refuses to pay, he is to be compelled to come to the court and answer the claim.[82]

So far, no problems arise, provided the defendant appears before the court in answer to the court's summons or messenger. The problems in this issue concern the case of

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80. Mayyāra, op.cit. p.24; Ibn Abdul Salām op.cit. p.34; Tawādī, op.cit. p. 34; Dardīr, op.cit. pp. 162-3; Khirshī op.cit. pp. 173-4.

81. Ibid.

82. Ibid.

the defendant who has been duly summoned to appear and refuses either to appear in person or to send a representative or to settle up (or agree to settle up) with the plaintiff. Such a defaulting defendant may be ordinarily resident in the town of the court or somewhere around the town; or his place of residence may be somewhere within the jurisdiction, but far outside the town where the court is located; or he may have his place of ordinary residence outside the area of jurisdiction of the court.

1. Defendant who is either in town or near by.

If such a defendant appears the case goes on trial. If he refuses to appear (if he "makes default") then the court may either take some steps to compel his appearance by coersive measures or it may allow the plaintiff to proceed and prove his case as though the defendant were present. The plaintiff in such a case may obtain judgement in the defendant's absence and proceed to execution.[83]

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83. Ibid.

The procedure is as follows : First, the court must be satisfied that the defendant has received the court's official communication (summons or messenger) calling upon him to appear and defend the case. If the court is so satisfied and satisfied also that the default is a wilful default, and that the defendant has some property in the jurisdiction, the court shall call upon the plaintiff to prove his case.[84] When he has done so, the defendant will again be notified and given time to appear to challenge the evidence against him.[85] If he fails to do so, the plaintiff obtains judgement which shall be immediately executed by auctioning the defendant's property. He cannot later appear and ask to get the judgement set aside; he had been given the opportunity to do so and had refused to take it. He is treated on exactly the same footing as though he were present throughout

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84. Ibid. See especially Dardīr, op.cit. p.162 and Khirshī, op.cit. p. 173.

85. Ibid. This is by way of 'Īzār, a necessary and unavoidable part of procedure. Mālik is reported to have said that before he passes judgement or makes an order, the judge must ask the party against whom the judgement or order is to be made whether he has anything further to say. The authorities are virtually unanimous that a judgement without 'Īzār is reversible on that ground alone.

the trial - hence, not even the "judicial oath" (the yamīn-ul qadā'i) is incumbent on the plaintiff, since the defendant here is not an "absentee" (ghā'ib).[86]

If the plaintiff's claim is for the repayment of a debt or compensation and the defendant does not have any known property which may be attached and sold, the court is to have him arrested and brought to answer the case.[87]

2. Where the defendant lives not within or near the town of the court but within the jurisdiction - for example, within "a ten days' journey", and he refuses to come in answer to the summons of the court, the case may be heard against him just as in (1) above and execution shall follow, but subject to four provisos : first, since here the defendant is an "absentee" (a ghā'ib) the plaintiff must, after fully proving his case as above, swear the yamīn-ul qadā'i. He must swear that : he had not freed the defendant from

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86. This is regarded by the authorities not as a judgement in default of appearance, but as a judgement after a full-scale trial, and the rules herein apply equally in divorce petitions as well - see, for example, Ibn Farḥūn, op.cit. Vol. I, pp. 151-152.

87. Mayyāra, op.cit. p.24; Ibn Abdul Salām, op.cit. p.35; Dasūqī, op.cit. p.163.

the obligation, nor had the obligation been transferred to somebody else; nor (to his knowledge) has a wakīl been appointed to handle the suit on the defendant's behalf. Thos oath is compulsory in the case of an "absentee" defendant and no such case is complete without it.[88] Secondly, execution by sale of his property shall be delayed a while in case he returns.[89] Thirdly, there are two divergent views as to whether the defendant can, on later appearance, have the case reopened. The dominant view seems to be that he cannot unless there were strong grounds for his absence.[90] Fourthly, according to Khalīl, in this category of "absentee" defendants, claims touching on landed property may not be heard in his absence. Because (a) he is not too far away and (b) these landed property (Khalīl specifically speaks of dwelling houses, aqār) claims occasion a lot of unrest and ill-will and other difficulties,[91] and the defendant (since he is not very far away) should be waited for.

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88. Dardīr, op.cit. p. 162; Dasūqī, op.cit. p.162; Khirshī, op.cit. p.173; Ibn Farḥūn, op.cit. Vol. I, p.135; Mayyāra, op.cit. Vol. II, p.29; Ibn Abdul Salām, Vol. II, pp.94-95.

89. Ibid.

90. Ibid.

91. Dardīr, op.cit. p.163; Khirshī, op.cit. p.173.

But this rule does not apply if he is very far away.

Two observations may be made on this matter. First, in this class of "absentee" defendants, in cases involving repayment or compensation, where his property may have to be sold, one view - held by Ibn Qāsim - is that the sale should not take place immediately if it is feared that he may owe other debts.[92] The sale should in these cases be delayed. However, Mālik's view is that since he is still alive and possesses his zimmā there should be no delay.[93] If, after the sale, other creditors emerge, their claims still attach to his zimmā. Ibn Qāsim, on the other hand, says the defendant should be regarded as though he were dead and therefore without a zimmā.[94] This question whether the sale of his property should be delayed or not arises because any such sale is tantamount to making him quasi-bankrupt (it is a faflīs). The effect of making such a person quasi-bankrupt is to make all the debts he owes fall due immediately and anybody who

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92. See Mayyāra, op.cit. Vol. 2, p.29.

93. Ibid.

94. Ibid.

loaned (or let to) him any chattel becomes entitled to take it back even though the period of hire has not yet expired.[95] Secondly, problems can easily arise where the person comes back later with both a good reason for default and also able to prove his innocence - after his property has been sold. This problem is discussed below.

3. The third category, where the defendant is for the time being outside the jurisdiction (though he lives under the court's territorial jurisdiction).

The procedure as outlined above (category 2) applies in this case as well: The case will be heard in his absence and judgement given (but its execution will be delayed a while if it is feared that he may be owing other debts).[96] However, he has the right to have the case reopened on his return if he can "show cause".[97] The problem then arises : if he establishes his innocence after the judgement has been

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95. Ibid.

96. Ibid.

97. Mayyāra, op.cit. Vol. II, pp. 29-30; Dardīr, op.cit. p.163; Khirshī, op.cit. p.173; Ibn Farḥūn, op.cit. Vol. I, p.87; Ibn Abdul Salām, op.cit. Vol. II, pp. 94-96.

executed against him, what is the position as regards his claim to his property vis-à-vis the innocent "third party purchasers for value" ?

This may be illustrated by the following two examples :

i). Suppose a married woman sues her absentee husband who is either far away or a "missing person", a mafqūd. She claims he had left her for a long time without nafaqa and he had not sent her anything since he left her. The court imposes a period of waiting upon her at the end of which she remarries after iddà. (Or, the claim may be that her marriage contract provides that she may divorce herself if her husband absents himself from her for a stated period, and she proves both the existence of the marriage, the said term, and his absence for the said period. After the waiting period imposed by the court she remarries - at the end of the idda period in each case.)

ii). A creditor sues the ghā'ib defendant debtor and after proving the case he gets judgement and the defendant's property is sold to satisfy the judgement. What are the rights of the third parties and the defendants if the defendants return thereafter and succeed in setting aside the judgement in each case ?

Both commentators of Ibn Âsim - Mayyāra and Ibn Abdul Salām[98] - and others[99] are agreed that where third parties acquire rights under the sale (or marriage), the defendant cannot disturb these. All he can do is to obtain damages from the plaintiff - who has to repay him the value of the property. Where, however, no third party rights are involved, the decision of the court is reversible and the plaintiff gets back his property (or, as the case may be, his wife).[100]

Thus, in our examples above, supposing the defendant in the first example, returns just before the woman completes her idda, or after she has completed it but before she remarries. Here, according to Mayyāra, if he can prove his innocence (i.e. no lack of nafaqa or that he was not absent for the stated period) he gets back his wife. But if she had already contracted a marriage two divergent views, both ascribed to Mālik, are stated. The first view is that her mere contracting of a second marriage (without consummation) does not entitle the

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98. Ibid.

99. Ibid. See Mayyāra, II, ibid.

100. Ibid.

third party to any rights, and the marriage is to be rescinded and she goes back to the defendant. The second view is that the mere contracting of the marriage, even before consummation, gives him the right and the defendant loses her. But, whatever view is adopted, if there has been both remarriage and consummation, the defendant loses.[101]

One may comment here that the second of the above two views attributed to Mālik seems the more logical - i.e. the mere contracting of the second (subsequent)-marriage gives the new husband greater right to the wife than the absentee who now returns. Two things should be borne in mind here: first, the rationale of the rule is that innocent third party "purchasers for value" must not be made to suffer, and may not be deprived of their "purchases". The absentee who returns can only claim damages from the plaintiff.[102] Secondly, in the case of divorce and remarriage, the second husband becomes liable to pay half the dower as soon as the marriage is contracted,[103] and would therefore suffer unmerited loss if the first view were to be adopted. A third view, it

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101. See, for example, Mayyāra, op.cit. Vol. II, p.31.

102. See foot notes 99 and 100.

103. This is the rule in the law of marriage.

is submitted, should be adopted in the spirit of Istihsān[104]: whether the wife should stay with the second or return to the first husband (in cases where the second marriage has not been consummated when the first husband returns) should depend entirely on her choice.

In the second example, supposing the defendant's house had been sold to his alleged creditor, and he returns and proves his innocence; here no third parties are involved and the defendant gets back his house. Mayyāra says this is the only acceptable approach and it is based on istihsān, and any contrary view - i.e. to rescind the sale -"is pure qiyās".[105]

He says this rule is based on a precedent of the Qādil-Jamā'a Abul-Qāsim bin Sirrāj, which occasioned much disagreement between him and many of his contemporaries.[106] The case concerned a slave girl and was as follows : A merchant in Granada who owned a slave girl went to Tunis and stayed there for a long time. The girl claimed - apparently in the

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104. All of these matters, according to Mayyāra, are governed by istihsān and not by legal rules - ibid, p. 31.

105. Mayyāra, ibid, p. 31.

106. Ibid, p. 30.

Sultan's royal court - that the merchant left her no maintenance and that she did not know what to do. Thereupon one of the Sultan's courtiers took her under his care, and kept a record of his expenses incurred upon her. After some time the amount he spent on her reached almost the value of the girl and then he referred the case to the court. He proved his expenses on her, the absence of her owner, the rightfulness of the owner's ownership of her and he swore the yamīn-ul qadā'i. The girl was then valued by the court and handed over to him in settlement of his claim. He paid the balance (i.e. the difference between the amount he spent on her and her full value) to be kept for the merchant (the original owner of the girl). He then manumitted and married the girl. Some months later the merchant returned and sought to get the decision of the court reversed and the sale of the girl rescinded. He claimed (a) that he had left her enough nafaqa and (b) that in any case she had a trade on which she could live. However, though the case he made was strong (and what one might call the "equities" in the cases were equal), Ibn Sirrāj refused to disturb the judgement, because third party rights (i.e. the manumitted girl's right to stay free) were involved.[107]

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107. Ibid.

The absence of the defendant may be absence ab initio (which is what the above has dealt with throughout) or it may be that the defendant had appeared at the beginning of the proceedings, but failed to continue attendance thereafter. In the latter case, he is to be treated as if he were present throughout the proceedings.

The fees (ijāra) for bringing the defendant to the court are to be borne by the Bait-el-Māl primarily. If it does not pay him, the judge should. If he, too, does not, then it is the plaintiff who must bear it - unless the defendand is guilty of ladad, in which case he has to reimburse the plaintiff.[108] Ladad according to both Mayyāra and Ibn Abdul Salām means persistence by the defendant in resisting a claim against him which he knows to be valid.

However, the defendant is in theory under no obligation to respond to an invalid da'awā - one which either discloses no cause of action or which has no legally valid basis.[109] Secondly, it is unlawful (harām) for the plaintiff to sue the defendant for a debt if he knows the defendant to be, at the time of the suit, impecunious.

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108. See footnote 78 above.

109. Ibn Rihāl op.cit. Vol. I, p. 25 .

This Chapter is best concluded by noting Ibn Rihāl's observation that a lot has been said concerning the subject of absentee defendants.[110] After discussing the different categories of ghā'ibs and some of the views on how to deal with each category, he said there should be no rigid rules governing this matter. It should be left to the judicial discretion of the judge. And the judge should be guided by the best interests (maslaha) of the litigants. Pressing his point home, he illustrates the difficulties of classifying distances. (These are classified by the authorities in such terms as "easy miles", "a distance of ten days' journey on a safe road", or "two days' journey on an unsafe road"). He says "to an old man without anything to ride on, three miles may be 'difficult', whereas to a youth with something to ride on, a whole day's journey would be easy."

With this view of Ibn Rihāl's one cannot agree more. When the various contributions to this subject made by the different authorities are examined, their views and their thoughts will be seen to have been conditioned by the difficulties of communications. Modern means of communications and

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110. Ibn Rihāl, op.cit. p. 24.

travel have reduced the value of the classical discussions on, and classifications of, distances.

Dealing with the topic today, and taking the advice of Ibn Rihāl, the whole discussion boils down to the single issue of whether the defendant can be reached and served with the court's process. This depends on whether his whereabouts are known. If his whereabouts are known, then he can be served by either the court's profess server or by posting the process to his address - depending on how far away he is from the court. If, on the other hand, his whereabouts are not known, what is technically knows as "substituted service" may be used - for example, newspaper advertisements.[111] What form of substituted service is to be used should depend on what the court, considering all the circumstances, may direct. In either case, the trial should not proceed, but should be delayed for a long enough time to enable the defendant to either appear (himself in person or by an agent) or at least signify his acknowledgement of the receipt of the court's process. If the court is satisfied that the defendant

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111. One of the methods of substituted service under the Area Courts (Civil Procedure) Rules. See Order 3, r.5(b).

had had notice of the case pending against him and has had time enough to come and answer it and fails to do so, then the court can proceed with the case.

How far does the practice of Northern Nigerian courts conform with the Shari'a rules ? The following three examples show that the courts use their discretion far more than they should.

1. Amina w/o Garba Baba v Garba Baba.[112]

The plaintiff, Amina, wife of Garba Baba (the defendant) petitioned the Zaria Chief Alkali's Court for the dissolution of her marriage on the grounds of desertion and lack of maintenance. She proved both allegations by the evidence of her father-in-law - who testified that her husband had left her for more than a year and left her without maintenance.

The court wrote to the defendant who was in the Mid-Western State (of Nigeria) asking him either to appear or

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112. Case File No. 379/119/67, Chief Alkali's Court, Zaria, October 1967.

"put the plaintiff's affairs into her hands" (i.e. to grant her a divorce). The defendant wrote back saying he would do neither.

One would have expected, at this point, that the court would either, without any further delay, dissolve the marriage - on the two solid grounds of desertion and lack of maintenance - each of which is quite sufficient by itself; or at the very least ask the wife to wait for a stated period (for example 30 days) and then come back and obtain a dissolution if at the end of that period the defendant is still absent.

Instead, the court (a) asked the plaintiff to refund the defendant's "expenses on the marriage",[113] and (b) asked her to wait for another 30 days - in case the defendant returned. She paid the money and waited another 30 days before she obtained the decree.

The court gave no reasons at all for this decision; and one can think of hardly any reason for the decision - except, perhaps, ignorance of the law, or wilful disregard for it.

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113. Which, in Northern Nigeria, means both ṣadāq and other customary expenses which are not part of the ṣadāq, and are unrecognized by the law.

2. Gambo Hasan w/o Adamu Zaria v Adamu Zaria.[114]

The second case is more in conformity with the rules.

It was again a petition for dissolution of marriage by the plaintiff-wife on grounds of derertion and lack of maintenance. She proved the defendant's absence (for three years) and the lack of maintenance by the evidence of the defendant's father (and another witness). On proof of these facts, the court ordered her to wait for another thirty days at the end of which she was granted a decree.

The court informed the plaintiff that her decree was only conditional throughout the idda period - the condition being that if her husband returned during her idda, he could reinstate the marriage.

However, it should be noted that although this was a sound decision, the condition imposed was, by its absolute nature, unsatisfactorily worded. She was under no legal obligation to go back to the husband, even if he returned during her idda unless he could prove his innocence: Unless he could do this he could not reinstate the marriage as a matter of right (i.e. by rij'a). He could, of course,

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114. Case File No. 375/494/67, Chief Alkali's Court, Zaria, October, 1967.

"renegotiate" - something quite different

3. Fati Kacalla v Isa Dako Agege.[115]

The last example is again another petition by the wife for the dissolution of her marriage, and again on the twin grounds of desertion and lack of maintenance. The defendant left the plaintiff wife without maintenance and apparently emigrated to Agege in Western Nigeria. After a period of two years the plaintiff went to the Junior Alkali's Court and asked for the Junior Alkali's intervention to compel the husband either to maintain her and end the desertion, or to grant her a divorce. The Junior Alkali gave her a letter to the Sarkin Hausawa (the Chief of the Huasa Community) of Agege requesting the Sarkin Hausawa to get the defendant to either reconcile with his wife or divorce her.

We may note that this is along the lines suggested by the Shari'a rules in one of the three categories of "absentee" defendants - that the court should write to some of the amthāl to handle the case in the place where the defendant is. The analogy, however, ends there. In the Shari'a texts the

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115. Case File No. 80/126/67, Chief Alkali's Court, Zaria, April 1967.

amthāl are required to settle the case (by sulh or adjudication) or to compel the defendant to go and answer the case before the court. This did not happen in this case.

The Sarkin Hausawa in Agege did not succeed in settling the case. The defendant refused to do either of the things asked of him and, for good measure, took away the plaintiff's baby daughter. So she now came to the Chief Alkali's Court. The court asked her to wait another thirty days and then granted her a decree.

CHAPTER IV

PLEADINGS - "DAAWA".

The last chapter dealt with parties to a civil action and how a defendant is brought before the court to answer the claim made against him. This chapter deals with the trial procedure once the parties are properly before the court.

In trials in the High Court, the parties will have exchanged wirtten pleadings before they present themselves before the court for the actual trial of issues joined.[1] In the Shari'a courts the parties do not exchance written pleadings prior to their appearance in the court. They have to be present in the court first, and then pleadings are exchanged[2] - orally as a general rule - and issue joined. Thereafter the trial of the issues immediately follows. This, as will be seen below, is the same as the Shari'a practice (which the Area Courts Edict requires the courts to apply[3]). We may note, however, that under the Shari'a procedure, the "Statement of Claim" is sometimes required to be in writing.[4]

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1. See the High Court (Civil Prodedure) Rules, Or. 32 r.1. But if the court finds it unnecessary to order written pleadings, these may be dispensed with.

2. See the Area Courts (Civil Procedure) Rules, 1971, Or.10, rr.1,2.

3. Ibid, r.2.

4. See below, p.

The first thing the court has to do is to decide who has to prove his case.[5] The initiator of the proceedings, the plaintiff, is not necessarily always the party who has the duty to prove his claim. The duty is always upon the mudda'ī who often is the plaintiff, but it may sometimes be the defendant, depending on the nature of the case. If the mudda'ī fails to prove his case in the manner laid down,[6] he may lose it because, as we shall see,[7] the court has no power to decide a case on the basis of "the balance of probabilities".[8] The other party is called the mudda'ā alaihi.

1. The "mudda'ī" and the "mudda'ā alaihi".

The first preliminary issue, therefore, which the court has to decide before the main trial itself can be proceeded with, is : who of the parties is the mudda'ī and who the mudda'ā alaihi ? This matter has been the subject of considerable debate and discussion by the authorities - wholly out of proportion with its difficulty, if not its importance. The cases in which the plaintiff is not the mudda'ī but the

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5. The mode of proof is discussed in Chapter V below.

6. Ibid.

7. Ibid.

8. Ibid.

mudda'ā alaihi and the defendant the mudda'ī do not either reveal any special difficulties peculiar to their nature or class, nor do they seem to be of unusual juristic importance or interest. But in spite of this fact, the question who is the mudda'ī and who the mudda'ā alaihi has been accorded an awe-inspiring treatment by the authorities. They regard it not only as being very important (which it is) but as being very difficult as well (which, it is submitted, it is not).

Thus, Ibn Āsim opens his chapter on arkān-ul qadā (which we may translate here as "the chapter on procedural matters") with the following verse :

> "The ability (or skill?) to distinguish the mudda'ī from the mudda'a alaihi constitutes the sum total of procedure ('qadā')". 9

With this, Mayyāra - one of the commentators on Ibn Asim - substantially agrees, and enumerates several other authorities who regard this matter in the same exaggerated esteem. Some authorities, Mayyāra informs us, compare the ability to distinguish the mudda'ī from the mudda'ā alaihi with the doctor's ability to diagnose his patient's complaint.[10] Just as a correct diagnosis by the doctor leads to the correct prescription and cure, so with the judge : his correct determination

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9. Ibn Āsim, op.cit. p.3.

10. Mayyāra, op.cit. p.15.

of the preliminary issue of who is mudda'i and who is mudda'ā alaihi ensures the easy resolution of the dispute before him.

According to Ibn Farḥūn

> "the science of qadā revolves around (knowing)who is the mudda'ī and (who) the mudda'ā alaihi" 11

because, according to him, "it is a complicated principle". He adds that although the authorities are in full agreement on the respective duties reposed on the mudda'ī and the mudda'ā alaihi, they disagree in their various definitions of the terms. Even Shurayḥ "the Qādī" who has been reported to have said that since his appointment as a judge he had never failed to grasp the point in dispute between litigants before him, admitted the difficulty of determining who of them is the mudda'ī and who the mudda'ā alaihi. He said that in the very first case that came before him the question of who was the mudda'ī and who the mudda'ā alaihi baffled him.[12]

And both Ibn Farḥūn and Ibn Abdul Salām conclude their discussions on this topic by saying that it is because of the subtleties of such problems (as mudda'ī and mudda'ā alaihi) which the judge has to solve that makes the office a difficult one.[13]

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11. Ibn Farḥūn, op.cit. p.122.

12. Ibid, p.124.

13. Ibid. And see also Ibn Abdul Salām, op.cit. p.27.

I should like to suggest, at this point, that the reason for the long discussions of this issue is the attempt by the various authorities to interpret and apply the rule promulgated by the Prophet that

> "evidence is upon the mudda(ī and the oath upon the one who denies (the claim)". [14]

One must resist the temptation to give further illustrations and enumerate more authorities, all of whom express their support for the above views in similar vein. All of these authorities have also made their different contributions to the attempts to define these terms - not always with the most dazzling success. Their failure to define these terms accurately is immediately noticeable on examining Mayyārah's[15] and Ibn Abdul Salām's[16] critical analyses of such attempts. However, despite the vast literature on the definitions (and the analyses and criticisms of the definitions) all the different views really fall into three main groups, as follows :

i. The first group comprises the views of those authorities who adopt the simplistic approach that the plaintiff is

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14. See, e.g., Mayyārah, op.cit. pp. 19, 20; Ibn Abdul Salām, op.cit. p.30; Tawādȳ, on the margin of Ibn Abdul Salām, op.cit., p.30; Qarāfī, Furūq, op.cit. No. 232, p.74.

15; Mayyārah, op.cit. pp.15-17; 19-20;

16. Ibn Abdul Salām, op.cit. p.25; Tawādȳ, p.25.

the mudda'ī and the defendant the mudda'ā alaihi.[17]

This formula covers most cases, but not all cases. As Mayyāra in his criticism of this formula points out, it cannot cover the case where the plaintiff is an orphan-ward who has attained majority and sues his wasī-guardian for the return of his property under the defendant's guardianship.[18] Nor does it cover the case of a woman plaintiff who sues her husband for the full sadāq (after valid khilwa) alleging that the marriage has been consummated. In each of these cases, the plaintiff's case is supported by the asl presumption in the ward's case,[19] and urf in the woman's case.[19a]

ii. The second group of views coverge on the formula

> "anyone who seeks to impose a burden ('to disturb') a free zimma or seeks to unburden (to 'free') a burdened ('disturbed') zimma is the mudda'ī and the mudda'ā alaihi is the opposite." 20

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17. See Mayyārā, pp.15-16; Ibn Abdul Salām, op.cit. p.26; Tawadī, p.26.

18. Mayyāra, op.cit. p.17; Ibn Abdul Salām, op.cit. p.26; Tawadī, p.26.

19. See Qarāfī, op.cit. No. 232, p.75, where he points out that the guardian must hand over the property before witnesses, even though he is presumed truthful in respect of the administration of the property. See also Ibn Farḥūn, op.cit. p.125; Ibn Abdul Salām, op.cit. p.25.

19a. See Ibn Farḥūn op.cit. Vol. II, p.63. Also see p.117 ibid, where he says views differ as to whether an oath is necessary from her.

20. See Mayyāra , op.cit., p.16.

This formula, again, covers most, but not all, cases since the examples given above (of ward v guardian and wife v husband claims) are outside the formula and demonstrate its inadequacy. In each case it is the party who seeks to "disturb" a "free zimma" who is the mudda'ā alaihi and not the other way round.

iii. The third group is the group which includes the views of the majority of the authorities - both "definers" and critics. It includes Al Qarāfī, Khalīl, Ibn Āsim, and others. Their views may be reduced to a formula and stated thus :

> "The Mudda'ī is the party whose qaul (claim, averment) is contradicted by one of the legal presumptions (of asl or urf) and the Mudda'ā alaihi the party whose qaul is supported by one of the legal presumptions." 21.

This is without a doubt the most satisfactory formula which covers all the cases, but it has its own difficulties - notably the fact that it is sometimes difficult to say which averment accords with the asl presumption in a given case. This point is dealt with below. The other point of difficulty is that the meaning of asl itself is not really clear enough. This, too, is discussed below and a definition suggested.[22]

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21. Ibn Āsim, op.cit. pp. 3-4; Qarafi, op.cit. No. 232, p.74; Dardīr, op.cit. p.143; Khirshī, op.cit; pp.153-4; Mayāra. op.cit. p.17.

22. See below, p.

Apart from the three groups of views above mentioned, there are others (one might call them "stray views") which are outside the main stream of any of the above categories. But they do share in common with the others the shortcomings of the various formulae adumbrated by the others. Ibn Farḥūn quotes al Māzarī and others as saying that

> "the mudda'ī is the party who, if he chooses to keep silent, must be left in his silence (i.e. he cannot be compelled to say anything, unless he wants to), and the mudda'a alaihi the one who may not be allowed to remain silent". 23

Quite apart from begging the question (in many cases), this formula does not cover our two examples above. Nor is the other "stray view" formula (that the mudda'ī is the party who makes a positive averment[24]) any better, since (a) in some cases both parties may make positive averments (see below under asl presumption), and (b) even where only one party makes a positive averment he may nevertheless be the mudda'ā alaihi (like the woman in the above example who claims consummation of her marriage). There are several other formulae which, again, must be left out because they

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23. Ibn Farḥūn, I p.123.

24. Ibid.

are of very little significance for the purposes of clarifying the issues.[25]

From the discussions so far two points seem to emerge clearly: first, it is impossible to enunciate any a priori rules or formulae on the definition of mudda'ī and mudda'ā alaihi without recourse to the rules of presumptions (which are discussed below). Secondly, although proceedings are generally initiated by one party, the plaintiff, yet once the proceedings are begun a number of issues emerge, each issue having to be decided separately, and the roles of the parties may therefore change more than once in the course of the trial.[26]

With the above in mind and for the purpose of simplifying an issue which, it is submitted, has been needlessly complicated, it is best to abandon the cumbersome terms "mudda'ī" and "mudda'ā alaihi" and stick to a simple formula of two rules throughout these discussions. The following may be suggested :

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25. See, e.g., Ibn Farḥūn, I p.123, e.g. the opinion of Ibn Abdul Birr and others who say "he who seeks to obtain something is the mudda'ī and he who seeks to defend it the mudda'ā alaihi". Adawī's formula (Khirshī, op.cit. p.154) is "the one whose averment contradicts the ẓāhir is the mudda'ī and the mudda'ā alaihi the one whose averment accords with the ẓāhir."

26. See Chapter V part 2 below. Thus, for example, the plaintiff who adduces evidence to prove his case becomes the mudda'ā alaihi when it comes to the challenge of his witnesses.

1. The mudda'ī is the party who bears the burden of proving his case.[27]

2. The plaintiff is the mudda'ī in any cause other than a cause in which his claim is supported by any of the legally recognised presumptions.[28]

With this formula in mind, the cumbersome terms "mudda'ī" and "mudda'ā alaihi" may be dispensed with except in cases where the plaintiff's claim accords with any of the presumptions - in which case he becomes, for our purposes, "the plaintiff/mudda'ā alaihi". It should be noted that to refer to the mudda'ī as the plaintiff and the mudda'ā alaihi as the defendant is in keeping with the authorities' usage of these terms. The authorities use the term "mudda'ī" sometimes to mean the plaintiff, in the sense of the initiator of the proceedings, and sometimes to mean the party on whom the burden of proof rests.[29] And conversely, the "mudda'ā alaihi" is also used in the two different senses.

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27. This is the rule undisputed by any of the authorities - see f.n. 14 above.

28. See f.n. 21 above.

29. See, e.g., their various discussions on venue - e.g. Mayyāra , pp. 21-22; Ibn Rihāl (on the Margin of Mayyāra , op.cit) p.22; Dardīr, op.cit. pp. 143-4; Khirshī, op.cit. 153-4.

2. Presumptions

A party's initial status is governed by the rules on presumptions which also determine theqquestion of who bears the burden of proof, and generally chart the course of the proceedings. Presumptions must therefore be treated here before other matters of the trial procedure are discussed.

Quite apart from anything else, the rules on presumptions play the important role of providing the court with a starting point in its inquiry - both in terms of whom and where - which of the parties starts, and where he begins from.

We may observe, in this connection that under English law[30] (and the Nigerian "English law") presumptions are usually classified as : (a) presumptions of fact; (b) rebuttable presumptions of law; and (c) irrebuttable presumptions of law.

The irrebuttable presumptions of law are hardly presumptions at all; they are, rather, rules of substantive law expressed in presumptive form. As far as the Shari'a is concerned, there are only two irrebuttable presumptions of law : (a) people who die in "a common calamity" (in commorientes) are conclusively presumed to have died at the same time and

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30. See Cross and Wilkins: Outlines of the Law of Evidence, London, 1971, p. 40, where the authors define presumptions as assumptions "which must be made until evidence to the contrary is adduced".

(b) in disputes concerning uyūb-al-furūj and haiḍ, the woman's word is conclusive (see Chapter V Part 1 below).

Presumptions under the Shari'a are broadly classifiable into two categories P presumptions of matters of common knowledge, which the court takes judicial notice of, and nominate presumptions which the Law enjoins, which may be called "presumptions of law".

(a) Asl - or the rebuttable presumption of law.

The authorities generally speak of asl as the original or the basic state of things[31] - hence the propositions that "the asl in debt claims is freedom from them"; "the asl is freedom of the zimma". [31a] In short, the asl presumption, in respect of an individual, is that he is free in his person, free in his zimma and innocent.

However, on closer examination one will find that the authorities regard asl basically as a "rebuttable presumption of law". Thus, in a number of cases where the court has to make a presumption, we find the authorities referring to such a presumption as asl even though no question of "the original

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31. See, e.g. Dardīr, p.143; Dasūqī ibid; Khirshī, p.154; Mayyārai, p.15; Ibn Abdul Salām, p.26; Adawī, p.154; See the definition of Lapanne-Joinville, in Milliot (Ed.) Traveaux de la Semaine Internationale de Droit Musulman, Paris, 1953, p.81, as "the logical order of things" - a definition based, he says, on "a static conception of things".

31a. See, for example, Ibn Farḥūn, op.cit. Vol. II, p.117.

state of things" is involved. We find them, for example, disagreeing as to what is the asl (i.e. whose qaul accords with the asl) in a dispute between landlord and tenant concerning the number of weeks during which the property has been in a state of disrepair - and therefore uninhabited by the tenant.[32] Whatever view one takes on whose qaul should be accepted until the contrary is proved, one can only call it a rebuttable presumption. The landlord (in our example) says the house was out of use for only two months, and the tenant says it was three months. Some of the authorities argue that because "the asl in things is lack of liability" the tenant's qaul "is the asl". Others say that since the basic asl (of the tenant's freedom from liability) has been destroyed by his admitted indebtedness, the landlord's qaul is the asl. The latter authorities compare this case with the claim of a slave to have been freed (as opposed to a claim that he had never been a slave), a claim he has to prove because "it is against the asl".[33]

Another example of asl being used to mean a "rebuttable presumption of law" is where the plaintiff (X) sues the defendant (Y) for the return of some article he, X, deposited with

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32. See Ibn Farḥūn, p.124; Ibn Abdul Salām, p. 27.

33. Ibid.

Y. Or, it may be a claim for the repayment of a loan X gave to Y. Suppose Y says in reply that he did indeed receive the article (or the money) from X, but that it was a return (or a repayment) to him by X of a loan received earlier. Here each of the parties avers that the other owes him a debt, and therefore the maxim "the asl is freedom from debts" is of little help. Yet the authorities have suggested where the asl lies.[34]

Many other examples of this usage could be given, but we may conclude the argument by referring to the example given above of a ward who sues his guardian for the return of the ward's property in the guardian's possession. This is one of the cases where the plaintiff is the mudda'ā alaihi because, according to all the authorities, his claim is supported by asl presumption.[35] This is also the case where a bailor sues a bailee. Here the law intervenes and provides that the asl is that a bailee is trustworthy.[36] This, explains Dasūqī, is a rule based on public good.[37] If the rule were otherwise nobody would accept the responsibility to keep something for a person who may need to have it kept in safe custody while,

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34. Ibid.

35. See f.n. 18 above.

36. Dardīr, p.144; Dasūqī, ibid; Khirshī, p.155.

37. Dasūqī, p.144; Ibn Farḥūn, op.cit. p.126.

e.g., he travels. And, if this happens, the general public would be the worse off. (We may note, however, that this rule does not apply if the bailor gives the thing to the bailee in the presence of witnesses.[38])

(b) Urf - or the rebuttable presumption of fact.

The presumption of urf is another rebuttable presumption, but a presumption of fact based on matters of common knowledge, common sense, and customary practice.[39] It is really nothing more than matters of circumstantial evidence[40] of which the courts take "judicial notice".[41] If we take the most widely used example of urf, cases of dispute between husband and wife concerning the ownership of a houshold article,[42] we will find

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38. Dasūqī, ibid; Ibn Farḥūn, p. 125; Khirshī, p. 155.

39. See Ibn Farḥūn, op.cit. p.123, where he illustrates this by the claim of a woman for nafaqa against her hāḍir husband. He points out that "both urf and ghāib support the husband in our view. But to the Shafiīs the woman's qaul is the one supported by asl - because the asl is lack of nafaqa .".

40. It is interesting to observe that both Qādī Ismāīl (quoted by Ibn Farhūn op.cit. p. 202) and Cross & Wilkins, op.cit. p.40, regard this as circumstantial evidence (qarā'in).

41. See Ibn Farḥūn, p.202, where Qādī Ismāīl is quoted as saying that the use of such circumstantial evidence is not outside the basic rule of"alal mudda'ī al bayyina ... "

42. Ibn Farḥūn, ibid; Mayyāra , op.cit. p.15; Ibn Abdul Salām, op.cit. p. 25.

the point well illustrated. The authorities say that in such a dispute, the court should consider whether the article is one generally in the ownership of men or women and presume accordingly. Thus, a mirror should be presumed to belong to the woman and a sword to the man. Another example - given by Ibn Abdul Salām[43] - is that if a judge and a soldier dispute over the ownership of a weapon (e.g. a rifle) then the soldier is presumed to be the owner. But the best example to illustrate the point that urf presumptions are really based on circumstantial evidence, is the example of the case where a person, X, who has a turban on his head while having another turban in his hands, and is running away. If such a person is being pursued by another person, Y, who has no turban on his head (and who is known to always wear a turban), it is to be presumed that the turban X has in his hands belongs to Y.

(c). Istiṣḥāb - or the doctrine of continuance

Ibn Farḥūn, after discussing the various formulae suggested by various authorities for distinguishing the mudda'ī from the mudda'ā alaihi, advised against relying on any of the definitions.[44] The best way out of this difficulty, he suggests

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43. Op.cit. p.25.

44. Ibn Farḥūn, p.123.

is to stick to the rule of istiṣḥāb-al-hāl (what we may call the "doctrine of continuance").[45]

There is no doubt at all that by using istiṣḥāb (either alone or together with another one of the presumptions) any problem concerning presumptions can be resolved. Applying the doctrine of istiṣḥāb, for example, to the two problems mentioned above (of the landlord v tenant and borrower v lender) we may resolve them as follows : In the first case (landlord v tenant) the last-known (i.e. undisputed) fact in the case is that the tenant was in occupation of a good house, the property of the landlord. Then (according to the example) he claims it became unsuitable for habitation for some time because of partial collapse (which had to be repaired). As a rule, since it was known to be in sound, habitable condition, it is up to the tenant to prove both (a) the fact that it ceased to be habitable and (b) for how long it remained in that condition. But since (a) has been admitted, he must prove (b) and therefore the landlord's qaul accords with the asl presumption. In the second case (where X sues Y for the return of some article or money borrowed by Y who claims it was a repayment or return

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45. A good definition of istiṣḥāb is Lapanne Joinville's, in Milliot, op.cit. p.80 "to consider as still extant, at a later time, a state of things which has been proved to have existed at an earlier time".

of a loan) the basic presumption (of asl) is that both parties have free zimma.[46] But the last-known (because admitted) fact is that Y received money (or goods) from X. Now, since it has not been proved against X (and he does not admit) that he had ever received anything from Y, the freedom of his zimma continues and Y has to prove his claim.

3. The "da'awa" or the statement of claim.

This is the first of the preliminary stages of trial, and the most important. It is on the basis of the da'awa (sometimes called the maqāl[47]) - the claim, or "the statement of claim" - that the court determines the issue of who of the parties bears the burden of proof.

Once the court has decided who bears the burden of proof - a matter discussed above - the trial shall proceed and it may have to try at least two issues. Thus, having decided, for example in a claim on debt, that the plaintiff bears the burden of proving the main issue - the defendant's indebtedness - the court may also have to try the issue of the competence of the plaintiff's witnesses.[48]

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46. See f.n. 31 above.

47. See e.g. Mayyāra, op.cpt. p. 33.

48. See Chapter V and VI below.

The plaintiff is to be called upon to make the da'awa and the defendant has to reply, either by admission or denial.[49] It should be noted here that even if the burden of proof is not on the plaintiff, he nevertheless has to make the initial da'awa - the statement of claim - to which the defendant replies either by admission or denial. It is when the defendant denies, and issue is joined, that the burden shifts on to the defendant and he proceeds to discharge it, if he can.

The da'awa, which al Qarafi defines as "a definite claim or a claim against a definite zimma",[50] must be a proper (sahih) da'awa. If it does not satisfy the conditions of sihha, the defendant is under no obligation to reply to it. To qualify as a sahih da'awa it must satisfy the following conditions :

a. The condition of certainty.

The claim must be definite.[51] For example, "I claim against the defendant (or "he owes me") £x being the price (or balance of the price) of goods sold and delivered to him (or to his order)". It is not a proper da'awa for the plaintiff

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49. See Ibn Farhūn, p.159; Dardīr, p.145; Khirshī, p.154; Mayyāra, p.34; Ibn Abdul Salām, p. 48.

50. Furuq, op.cit. No. 231, p.72.

51. Ibn Farhūn, p.126; Mayyāra, p.17; Ibn Abdul Salām pp.28,29; Dardīr, p.144; Khirshī, p.154.

to say, for example, "I think I owe him ... ", nor "I claim against the defendant - or he owes me - something"; Both examples fail to satisfy the condition of certainty.[52]

However, if the plaintiff makes a definite claim against the defendant but says he does not know the exact amount (or quantity) involved, this will be accepted.[53] Thus if the plaintiff claims the balance of an account in transactions between him and the defendant, but says he does not know the exact amount of the balance, this will be accepted and the defendant has wither to admit and say what the balance is or deny the claim. There is no obligation on the plaintiff to aver that his claim is based on a legally valid contract, since this is presumed (an asl presumption).[54]

b. The claim must disclose a cause of action.

It must be muhaqqiq: a claim for a legally valid right - e.g. a debt or a sale, or a trespass to the person, etc. It must also be a claim which if the defendant admits it he will be bound. Thus, if the plaintiff claims an amount of money or an article from the defendant being on a promise of a gift to him by the defendant, or even a declaration of gift - e.g. "I have given you my pen," - this discloses no cause of action.

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52. Ibid.

53. Ibid.

54. Ibn Farḥūn, p.127; Dasūqī, p.144; Khirshī, p.154.

Even if the defendant admits the claim - that he had indeed uttered the words of hiba - he can nevertheless validly revoke the gift since actual delivery did not take place.[55] (Another exaple is if the plaintiff claims that the defendant occupied the plaintiff's seat in the mosque or an unreserved seat in the train. Here even if the defendant admits this no cause of action arises as there is no legal right to a reserved place in the mosque or in a general compartment of a train.) And it must not be a claim de minimis,[56] but a claim upon the outcome of which some legally recognised right depends.

c. The claim must not be a claim belied by either ādat (general custom, practice) or urf (common knowledge).

Al Qarāfī and Ibn Farḥūn[57] classify claims into (i) those belied by, (ii) those conforming to, and (iii) those neutral of urf or ādat, and Ibn Farḥūn gives the following examples.

i. Those belied by urf.

A plaintiff's claim to be the owner of a house which has hitherto been in the long and undisturbed possession of the defendant. Here, if the parties are in no way related to each other, and the defendant has been using the house or making alterations to it as he pleased and then the plaintiff, who was

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55. Ibn Farḥūn, ibid.

56. Ibn Farḥūn, op.cit. Vol. I, p. 128; Qarāfī, Furūq, No. 231, p. 73; Adawī, p. 153 who gives as an example a claim for a grain of corn.

57. Ibn Farḥūn, op.cit. Vol. I, p. 129; Adawī, op.cit. p. 153.

in praesentis and made no effort to stop the defendant, suddenly claims to be the owner of the house, his claim will fail. Such a claim goes against both urf and ādat : it is contrary to common knowledge of everybody and to the general and customary practice of people. This is because the general customary practice in such a case would be for the owner to try to stop the possessor from effecting any alterations, unless, however, the plaintiff alleges that he is a "sleeping partner" in the ownership of the house.[58]

Another example of a claim belied by urf is where a person claims to be the father of another - for example a slave or a tramp - who is older than the person who claims to be the father. Or if the alleged son

> "is e.g. a Sindhi and the claimant a Persian who has never been in the Sindh country". 59

ii. Claims that conform to ādat or urf.

The significance of this class of claim is that a plaintiff whose claim is supported by ādat or urf need not make out a prima facie case against the defendant before the

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58. Ibid. See also Ibn Farḥūn, Vol. II, p. 119. No length of time in possession is suggested by the texts, because this is not an issue of "statutory time bar". But see Chapter VI below where the issue of "time bar"is discussed.

59. Ibn Farḥūn, op.cit. Vol. I, p.129 and Vol. II p. 123. But if the claim is in respect of a child and there is no proof that the claimant has never been in that country, then "his iqrār is valid" - ibid, Vol. II, p.123.

defendant is called upon to exonerate himself by the exonerative oath (discussed below). Thus, a plaintiff who claims against a tailor that he (the plaintiff) had given the tailor a piece of cloth and asked him to make a suit out of it, need not prove khulṭa.[60] His claim is supported by urf.

iii. Neutral claims.[61]

These are the ordinary everyday type of claims - e.g. a claim of debt against the defendant in which the defendant can only be called upon to swear the exonerative oath on proof of khulṭa.

4. The statement of claim may be made orally or in writing.

A proper statement of claim may be made either orally or in writing, but as a general rule it should be made orally, unless it is long or complex, in which case the court shall order the plaintiff to make it in writing or the court may itself reduce it to writing and the defendant must be given a copy of it.[62] A statement of claim made in writing must show wheter it is the plaintiff who has made it or it is the court that recorded the plaintiff's oral statement. It must also

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60. Ibn Farḥūn, pp. 129, 130; Khirshī, p.155; Dardīr, p.145.

61. Ibn Farḥūn, p.130.

62. Ibn Farḥūn, p.49; Mayyārah, pp. 33, 35; Ibn Āsim op.cit. p. 6.

show whether it is the judge or his scribe who recorded it, and should therefore be made in the following form :

> "In the Court of Justice of (such and such a town/place) Before Judge X s/o Y
>
> A s/o B has appeared before me (or, if it is the scribe who writes "before the judge"), and has claimed against C s/o D ... " 63

And the judge must sign or seal the statement. (If he does not, in fact, know A s/o B in person he has to say :

> "A man has appeared before me (or, as the case may be, "before the judge") and has said he is A s/O B and has claimed against ... ") 64

5. The nature of the claim.

a. Claims for the return of tangible things.

The way the rest of the statement of claim should be made depends on the nature of the claim. The claim may be for something tangible in the defendant's possession (actual or constructive) or it may be a claim for compensation or repayment of debt on the defendant's zimma. If it is a claim for (the return of) something tangible in the defendant's possession, the plaintiff must state :

i. What it is that he claims (i.e. the thing).

ii. That it is now in the defendant's possession.

iii. How it came into the defendant's possession - e.g.

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63. Ibn Farḥūn, p. 160.

64. Ibid.

by way of conversion, loan, bailment, or by whatever means it came into the defendant's hands.[65]

A claim for landed property is required to be made in more exact terms - stating its location and full address and its full extent - thus :[66]

> " ... (plaintiff) has claimed against (defendant) as follows : That all the house (or, as the case may be, land) located (in such and such a place, at such and such a street ...) together with all the rights (appurtenances) thereto belonging to him by right of ... (e.g. inheritance) and that the said house (or land) is now in (the defendant's) possession by way (for example) of ... (e.g. ghasb - usurpation)." 67

b. Claims against the defendant's zimma.

In claims for rights against the defendant's zimma, the plaintiff's statement of claim must state :

i. The right he claims against the defendant (e.g. price of goods sold and delivered, compensation, repayment of debt, etc.).

ii. The value of the right (in the current legal tender - naqd-al-waqt).

iii. How the plaintiff came to be entitled to the right - e.g. by sale, sale of goods and delivery, or services

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65. Ibn Farḥūn, p.130.

66. Ibn Farḥūn, op.cit. p.130.

67. Ibid.

rendered at the defendant's request. He should mention the weight, measure, length, or number - i.e. the quantity - if the goods are (or the commodity is) quantifiable. He should also mention the nature of the goods where applicable ; e.g. in sale of livestock, the type, age, sex, etc.[68]

In claims based on trespass to the body, the statement should mention the type of wound inflicted (including its name if it has one and the plaintiff knows it) and the part of the body on which it is inflicted.[69]

In claims based on defamation, the offending words must be stated "because not all slanderous words are actionable".[70]

c. Claims in matrimonial matters.

In matrimonial claims - e.g, a claim for maintenance by a woman or a claim by a man for what we may call restitution of conjugal rights (for example he wants his wife, who is now at her father's, to join him) - the plaintiff need only aver the existence and continuance of a valid marriage.[71] This is

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68. Ibid, pp. 130, 131.

69. Ibid, p.131.

70. Ibid, p.131. We may observe here that defamation, in the classical law, is quasi-criminal.

71. Ibid, p.132.

the view of Ibn Shas and is the dominant view.[72] There is no need either to aver that the marriage was contracted before two witnesses or that there was a walī, and it was with her consent, etc.

6. Where no cause of action is disclosed.

When the plaintiff's statement of claim is complete, if no cause of action is disclosed and the defendant has no case to answer, the judge says so and dismisses it. Thus a claim against a defendant based on gift without delivery (qabd), or a woman's claim that her husband has married a second wife without her consent (and her marriage contract does not contain a prohibitory stipulation) shall be dismissed. But if the claim, though not sahih, is merely incomplete, or vague or confused, the plaintiff shall be asked to complete or clarify it.[74] Thus

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72. Ibid. But note the view of Ibn Sahal which Ibn Farḥūn mentions (p.132) that this rule applies only to the case of strangers to the town. If the parties are ordinarily resident in the area of the court, and the plaintiff claims to have contracted the marriage with the woman in another area, the case may only be heard after proof of the marriage contract. Indeed, the judge is required to inquire into the truth or otherwise of the existence of a valid marriage contract. If he finds that there exists no valid marriage, and if the parties admit (or, rather, confess to) sexual relations, the judge is to impose the ḥadd punishment on them.

73. Ibn Farḥūn, p.48.

74. Ibn Farḥūn, o.cit. pp. 48, 130; Khirshī, p.161; Dardīr, p.151.

if he claims a parcel of land from the defendant without stating the exact address of the land, he shall be asked to state the address.

7. Where cause of action is disclosed.

If the claim is complete, clear and sahih (proper), the defendant shall be ordered to reply to it either by an admission or a denial of liability.[75] The defendant may ask for time - and he must be given it if he so asks - to go through a long or complex statement of claim before he replies.[76] But if it is short and clear, he shall be asked to reply immediately.[77]

He may ask for further and better particulars. Thus, if there were several transactions between the parties, the defendant can validly request to know (if the statement of claim does not make it clear) which transaction the plaintiff claims upon.[78]

8. Wakāla.

The defendant may refuse to reply and say he has a wakīl who will pepresent him and handle the whole case for him. This, according to Ibn Hindī,[79] is perfectly legitimate, but

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75. Ibn Farhūn, op.cit. p.159; Khirshī, p.154; Dardīr, pp. 143,4; Mayyāra, op.cit. p.34; Ibn Abdul Salām p.47; Tāwādī, op.cit. p.47.

76. Ibn Farḥūn, p.48.

77. Ibid.

78. Ibn Farḥūn, pp.130, 164-5.

79. Ibn Farḥūn, pp. 156, 165.

Ibn Ashagh's[80] view is that the defendant must at least reply to the da'awa before the wakīl takes over. If he refuses he is to be compelled (by punishment). Others say if the claim against him is a simple one he must reply to it first, but if it is complex he may hand over the whole case to the wakīl and leave him to plead as he sees fit.[81]

9. Joïnder of causes of action.

The defendant may ask to have all the plaintiff's claims (if they are more than one) joined. But if he asks to have both those that the plaintiff now claims against him and any others (if there are others) on which the plaintiff has not made a claim, such a request may not be allowed,[82] because the plaintiff is at liberty to decide upon which causes of action he wishes to make a claim. However, where the claim is for the estate of a deceased person, then all the claims that are in favour of the estate must be made; none may be left out.[83]

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80. Ibid.

81. Ibid.

82. Ibid, p.164.

83. Ibid.

10 Defendant's refusal to reply to the da'awa

If the defendant refuses to reply by either admission or denial and simply keeps mute, three different methods of dealing with him have been recommended. First, Sahnūn suggests that the defendant is to be compelled to reply.[84] This is to be done by imprisonment - a sort of imprisonment "until he purges himself of his contempt". The imprisonment may, at the court's discretion, be supplemented by corporal punishment.[85]

Asbagh,[86] on the other hand, recommends that the court should warn him telling him that unless he replies the plaintiff will swear and obtain judgement. On this view, the defendant is treated - by his silence - both as denying the claim against him and refusing to swear the "exonerative oath".[87]

The third view is that of Ibn al-Mauwāz[88] as well as Dasūqī.[89] According to them the defendant is to be treated as

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84. Ibn Farḥūn p.163. This is also the view of Khalīl, who says the defendant is "to be imprisoned, punished and adjudged against". See Dardīr op.cit. p.151; Khirshī, p.161, who explains that the imprisonment, beating and judgement are to follow in that order. See also Ibn Āsim, op.cit. p.6; Mayyāra, p.34; Ibn Abdul Salām, p.48.

85. Ibid.

86. Ibn Farḥūn, ibid.

87. Ibn Farḥūn, ibid; Dardīr, ibid; Khirshī, ibid.

88. Ibn Farḥūn, ibid.

89. Ibn Farḥūn, ibid; Dardīr, ibid.

having admitted the claim against him and the plaintiff obtains judgement without swearing an oath. This is the dominant view, and, it is submitted, the most practical and most in keeping with the spirit of civil procedure.

Al-Lakhmīy supports this view, but adds his own opinion :[90] the Court, he says, should give judgement for the plaintiff, but execution is to be delayed (for a reasonable length of time) in the hope that the defendant may later decide to deny the claim and be able to prove his innocence.

These rules apply both to the case of a defendant who refuses to reply to the whole claim or set of claims and to the defendant who replies to some and refuses to reply to the rest of the claims. In those that he replies to, the court deals with them according to the way he replies; and in those that he refuses to reply to the rules here mentioned apply.

10. Other interlocutory pleas by the defendant.

The defendant may make what we may call an interlocutory plea : for example, if the plaintiff is appearing as a wakīl for a principal, the defendant may claim forbearance

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90. Ibn Farḥūn, p.163.

of the claim by the principal. If he does this, some authorities say the wakīl-plaintiff must swear lack of knowledge of the forbearance and the proceedings to continue;[91] others say the case is to be adjourned and the principal sent for to come and clarify the position.[92]

12. Defendant's reply.

(a) By admission.

The defendant may admit the plaintiff's case in full. If he admits, the admission is to be repeated before two witnesses and then recorded thus :

> "In the Court of Justice of ... (place) before Judge X s/o Y, the defendant A s/o B in the matter between him and the plaintiff C s/o D has admitted the plaintiff's claim against him, to wit ... (the thing or amount claimed) due from the defendant from (i.e. by way of) ... (the transaction or cause of action). Payment to be made (i.e. judgement to be satisfied) immediately or ... (when). E s/o F and G s/o H bear witness to this admission against the defendant." 93

On admission, the court passes judgement for the plaintiff without the necessity for īzār[94] (though some authorities

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91. Ibn Farḥūn, p.161.

92. Ibn Farḥūn, ibid.

93. Ibn Farḥūn, ibid.

94. See Chapter V, Part 2 below, on īzār.

say even here îzār is necessary.[95])

b. Denial

1. General total denial.

The third possibility is denial by the defendant. If he wishes to deny the claim he must do so in definite and specific terms.[96] He may not, therefore, say, for example, "I do not think I owe you anything". He may not even say "I owe you nothing".[97] His denial, according to Ibn Qāsim,[98] must go to the root of the claim. This is the dominant view. If the claim is compound or complex, it must be broken up into its component parts and each part admitted or denied (or "confessed and avoided"); Thus, a claim based on a contract of sale - for example, for the price of goods sold and delivered to the defendant or to his order - comprises three component parts :

i. The sale (contract) itself;

ii. The delivery of the goods;

iii. The price.

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95. Ibn Farḥūn ibid, p.139. But see Dardīr, p.146 and Khirshī, p.156, where īzār is not considered necessary. See also Mayyāra.., p.34; Ibn Abdul Salām, pp. 48, 49; see also Jibir Daura, op.cit. p.8.

96. Ibn Farḥūn, p.162; Mayyāra.., p.34; Ibn Abdul Salām p.48.

97. Ibn Farḥūn, ibid; Mayyāra.., ibid; Ibn Abdul Salām, ibid.

98. Ibn Farḥūn, ibid; Mayyāra.., ibid; Ibn Abdul Salām, ibid.

The defendant has to admit or deny the basis - the contract itself - and then deal with the other two parts. He may admit the sale but deny the delivery and the refusal to pay. Or he may deny the whole transaction.[99] Some (notably Ashhab)[100] go to the extent of insisting that the defendant, if he wishes to deny, must deny liability on the basis of the plaintiff's claim "or on any other basis whatever". But al Baji[101] replies to this view of Ashhab by pointing out that the plaintiff is entitled to a reply solely on the basis of his claim and on nothing else, and the defendant is therefore obliged merely to deny the claim made and no other.

Mutarriff and Ibn Mājashūn,[102] indeed, take the other extreme view - that even what we may call "a general traverse" (i.e. a general denial) suffices. Unless the plaintiff's claim is for a specific amount of money. In such claims the defendant must deny liability in that amount or "in any other amount whatever",[103] unless he wishes to admit liability to part of the amount claimed.

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99. Ibn Farḥūn, p.163.

100. Ibid.

101. Ibid.

102. Ibid.

103. Ibid.

2. Confession and Avoidance.

It is, however, important that the defendant, if he decides to deny, makes up his mind at the outset whether he is going to deny the whole claim or only part of it. If he denies the basis of the claim he will be bound by his denial.[104] In the example of the sale contract given above, therefore, if he denies that the sale contract itself ever took place, he cannot later (if the plaintiff proves that it did take place) change his reply into one of confession and avoidance.[105] He cannot, for example, be allowed to bring evidence to prove that the goods were not delivered, or that he had paid for them. So, too, if the plaintiff's claim is for the return of, say, a donkey hired out to the defendant. If the defendant denies that the contract of hire ever took place and the plaintiff proves this, the defendant will not be allowed to prove that he had returned it or that it had died. If the claim is for the fees (ijāra) for the said hire (of a donkey) which the defendant denies, he will not later on be allowed to prove that he had paid the fees to the plaintiff.

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104. Ibn Farḥūn, p.161; Dardīr, p.151; Dasūqī, ibid; Khirshī, p.161; Adawī, ibid.

105. Ibn Farḥūn; ibid. Dardīr, ibid; Khirshī, ibid.

He may, of course, confess and avoid at the outset, but he cannot do so after a general denial at the beginning. This is the view held by Ibn Qāsim and others, and is the dominant view.[106] We may observe that this is in contrast with the English Law. Under the English rules of pleadings a defendant can make inconsistent averments. He may (in our examples above) deny that there was a contract in the first place, and then add that even if there was such a contract, he had paid the ijāra (or returned the donkey or paid the price, as the case may be[107]). We may also observe that Ashhab holds a variant view which accords with the procedure under English Law.[108]

13. Procedure after defendant's sahih denial.

As soon as the defendant replies to the claim by a proper denial, the court shall ask the plaintiff if he has witnesses to prove his claim. If he has no witnesses the court shall call upon the defendant to swear the "exonerative oath" and go free.[109] If the defendant swears and goes,

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106. Ibn Farḥūn, ibid; Khirshī, ibid.

107. See Odgers' Principles of Pleading and Practice (Nineteenth edition) by G.F. Harwood and B.A. Harwood, London, 1966, p.191.

108. Ibn Farḥūn, p.161; Dardīr, op.cit. p. 151.

109. Ibn Farḥūn, op.cit. pp.162-3; Dasūqī, p.146; Khirshī p. 156; Mudawwana, op.cit. pp.136-7. On exonerative oath, see Chapter V, Part 2, below.

the question that may arise is whether the plaintiff can get the case reopened at a later date if he satisfies the court that he has now found witnesses to prove the claim. The plaintiff can only have the case reopened if he satisfies the court that there was a good reason why he did not produce the witnesses at the right time.[110] This may be done by showing that he did not know that the witnesses were available; or that they were willing to appear for him; or that he did not know of their existence.[111]

However, there are five cases in which the plaintiff can get the case reopened on later discovery of evidence, as a matter of right.

These are cases in which the plea of what we may call res judicata is never available as a defence :

a. claims by a wife that her husband has divorced her by talāq.

As has been shown in Chapter V below, such a claim can only be proved by the evidence of at least two male adl witnesses. But if the woman fails to prove it at the relevant time she can do so any time afterwards, and the case will have

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110. Dardīr, op.cit. pp.146-7; Khirshī,pp.156-7; See also the Mudawwana , ibid and p.132.

111. Ibid.

to be reopened. This rule is one-sided and does not operate to enable the husband to get his case (of impeachment of the plaintiff-wife's wintesses) reopened.[112]

b. Claims against waqf property.

A plaintiff who claims, for example, to be one of the beneficiaries of the waqf but fails to prove his claim can have the case reopened any time afterwards on production of the requisite evidence. But the nāzir (the overseer of the waqf property) may not have his claim (against the plaintiff's witnesses) reopened afterwards.

c. Claims of nasab.

A plaintiff who claims to be related by blood to another person can always have the case reopened on production of the requisite evidence - two adl male witnesses.[113]

The other two cases in this class are itq (i.e. manumission of a slave) and the qasāma procedure.

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112. Ibn Farḥūn, op.cit. p.177; Dardīr, p.150; Khirshī, pp. 159-60.

113. Ibid.

CHAPTER V

TRIAL PROCEDURE AND MODE OF PROOF

In Chapter IV above the general outlines and some aspects of trial procedure have been considered. The defendant's admission of the plaintiff's claim and his silence have been dealt with. This Chapter deals with the procedure following the defendant's proper denial of liability, where the plaintiff wishes to prove his claim against the defendant. This is the most usual type of case, which is best considered under three main heads :

1. The Mode of Proof.
2. The Trial Procedure.
3. Conflict between Theory and Practice.

Although this thesis is not a work on the Sharî'a Law of Evidence, yet a general outline of that Law is necessary for the proper understanding of the Sharî'a trial procedure. We should therefore consider (under the heading "The Mode of Proof") the type of evidence necessary to prove a case, the quantum of evidence and the competence and compellability of witnesses.

It is equally desirable to attempt, at the outset, some explanation for the peculiarities of the Sharī'a trial procedures; for example, the use of oaths as a means or a partial means of proving or denying liability, and the peculiar probative requirements, all of which tend to suggest that the system rests on the principle that the finding of the judge "ought to be based on certainty not on conjecture".[2]

There is little doubt that the social milieu within which the rules were formulated and developed had had a great deal of influence on their content, but that is not the complete explanation. The most important reason, it is submitted, is psychological. The ancient jurists, as has been noted above,[3] were always extremely reluctant to set themselves up in practical judgement over others. They therefore

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1. See Chapter V, Part 2, below.

2. See Milliot: Introduction a l'Etude de Droit Musulman, Paris 1953, Chapter VI, Section V, p.731. See (below) in support of this view the attitude of the authorities towards documentary evidence, especially Muhammad ibn al-Mawwāz's fear that a person may write something which, at the time of writing, is a doubtful proposition, but which may then be given in evidence as a certainty - quoted by Ibn Farḥūn, Vol. I, p.357.

3. See Chapter II, Part 1, above.

generally refused to serve as judges and when they did serve it was always under compulsion. Ibn Farḥūn gives several instances of the learned fleeing from the office;[4] and Coulson has given another set of examples illustrative of this attitude of abhorrence for the office.[5] The most dramatic example was the case of Ibn Faruk who was forced to accept the office on pain of death. But when the first two litigants were ushered before him he burst into tears and implored them to free him "from the burden of themselves", not to be the first of his "ill omens". The litigants responded to his appeals and departed, and the Governor of Qīrawān (who compelled him to the office) also relented and relieved him from the office.[6]

However, despite their abhorrence for the office, they were well aware that it was an indispensable social need and indeed a meritorious office.[7] It was therefore necessary to

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4. Ibn Farḥūn, op.cit. Vol. I pp.14 and 15. See even and especially Saḥnūn had had to be forced into the office; and note how others who fled in order to avoid the office compared the perils of the office with attempts to swim across the sea.

5. Coulson, Doctrine and Practice in Islamic Law: One Aspect of the Problem, Bulletin of the School of Oriental and African Studies, 1956, pp.211-226.

6. Ibid, p.211.

7. See e.g. Ibn Farḥūn, op.cit. Vol.I, p.13; Mayyāra, op.cit. Vol. I, p.10.

persuade some people to assume the office even though it was recognised that the very fact of accepting (or being forced into) the office constituted a veritable peril for the soul - even for the most pious.[8] It was considered desirable to reduce the burden of responsibility for actually deciding cases to a minimum: It appears that the original aim of the authorities was to enable the judge, as far as possible, to avoid involvement in the investigative processes of trial - like examining the evidence before him and deciding by himself whether or not to accept it, etc. The authorities, therefore, encouraged the judge to assume a father-figure position, if that was possible in the circumstances, and by gentle pressure to bring the disputing parties to a reconciliation (sulh). He was required to warn and admonish the parties - to remind them that litigation is an evil to be avoided, that whoever tries to unjustly enrich himself at the expense of another is "assured of his seat in Hell fire", etc.[9] If sermonising fails he might even try delaying the trial by repeated adjournments

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8. See, further, (on the ominous nature of the office), Amedrov, Journal of the Royal Asiatic Society, 1910, Vol. 2, p.761-796, esp. at pp.773-5.

9. See e.g. Ibn Farḥūn Vol. I p.48, where he quotes al-Ḥaṭiṭi.

in the hope that the parties would grow tired of repeated appearances and decide to settle amicably among themselves.[10] Indeed, even the burning of their documents has been recommended if the judge thinks such a course would lead to amicable settlement.[11] But if the parties persist - or if the case is not amenable to reconciliation - then the judge, it seems, is expected by the rules to assume the role of a referee (who acts, rather mechanically, in strict accordance with the rules).

The aim of the rules of the actual trial procedure seems to be to "pass the buck" onto the witnesses in such a way that makes them "the real qāḍī, and the qāḍī a simple executor".[12] This, it is submitted, was plainly the position in the early days. Hence, Shurayḥ ("the Judge") used to remind the witnesses that it was they who decided the case and bore full responsibility for the consequences, not himself.

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10. Ibn Farḥūn, op.cit. p.39. But see further on ṣulḥ, Chapter VI, p. below.

11. Ibn Farḥūn, ibid, also Ibn Farḥun, Vol. II, p.144.

12. This is the view of a famous qāḍī, al Miksāni, as quoted with approval by Milliot, in his Introduction, op.cit., p.731. Milliot suggests that one of the aims of the rules is to protect the judge from the dissatisfied litigant (ibid p.732). But, it is submitted, even if this may have been one of the effects of the rules, it is very unlikely to have been one of the aims.

"Judgement will be passed on this Believer by you, by your testimony"

he would say to witnesses,

"and", he would add, "you are my shield from the fire. So fear God and the fire." 13

This attitude of minimum participation by judges which the authorities adopted and recommended, should be seen in a historical context because, although it still remains in theory the official position, there did develop a tendency to encourage judges to take a more active part in the trial procedure. For example, the judge is required to draw a party's attention to some arguement in the party's favour but unadverted to by that party.[14] He may receive and act upon the evidence of non-udūl witnesses, choosing the

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13. Ibn Farḥūn, op.cit. Vol. I, p.48.

14. Ibn Farḥūn, op.cit., Vol. I, p.42. He is also required to wathh the demeanour of the parties and examine their claims carefully because people "are suspect these days", ibid, p. 47.

best of them,[15] and circumstantial and documentary evidence (which in the early days was anathema[16]) became admissible in certain cases.[17] Inroads continued to be made into the rigidity of the rules until a position was finally reached that by means of siyāsa, and for the purpose of istihsān, judicial activism became permissible and encouraged.[18]

This process of tempering the justice of theory with the mercy of practice was facilitated and stimulated in the Mālikī School by the marrying of the "Bench" and the

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15. See Ibn Farḥūn Vol. I pp. 403-4 and see Chapter VI below. It should be noted here that the authorities were, in the early days, so concerned that the judge must be satisfied with the (competence) adāla (see below) of the witnesses that they engaged in lengthy discussions on the issue of transfer of a case from one judge before whom the adāla of the witnesses had not been established. See, for example, Ibn Farḥūn, op.cit., Vol. I, pp.51-52. Later on, however, the discussion shifted to the issue of how to deal with the testimony of non-adl witnesses. Thus we find, for example, Ibn Farḥūn quoting various authorities (especially "some of the later ones") that approve of admitting evidence by non-adl witnesses or those whose adāla has not been established. This was at first validated in "small matters" on grounds of istihsān (see for example p. 407) and darar (necessity - see p. 410) and, it seems, the rule became generalised in proprietary claims provided the witnesses appear to be reliable - see pp. 412-413.

16. The reasons for the inferior status accorded documentary evidence (a matter that should really interest students of historical and sociological jurisprudence) are breifly discussed below.

17. See Part 3 below and see also Chapter VI.

18. Ibid.

"Chair".[19] When some of the most eminent jurists were forced onto the Bench there resulted a two-way traffic of ideas and a great deal of cross-fertilization between theory and practical application. We find, for example, that not only did judges ask the opinion of the academic jurists in practical cases,[20] but sometimes jurists practising as judges adopted a specific viewpoint as a result of their practical experience.[21]

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19. Coulson points out that Islamic law "in its developed form, is a Jurist's rather than a judge's law" and that it was "a system where the academic lawyer controlled the practising lawyer, where the chair was not only more comfortable but more influential than the bench." He laments the state of affairs that prevailed in Islamic Legal History in which the jurists largely confined themselves to what we may call "armchair philosophising" unenriched by any particular practical human circumstances. This was undoubtedly the general rule, but the trend in the Mālikī School provides an exception to this rule. Coulson: Conflicts and Tensions, op. cit. pp. 9-10.

20. As has been shown in Chapter II above, it has always been recognised that the judge is required to consult the learned. This was the mashwara principle. But quite apart from this, individual judges did address specific questions to individual jurists asking their opinion. Ibn Farḥūn gives a number of instances of this kind of inquiry. He himself (at one time a judge) did ask Asbagh (Vol. I, p.144) concerning representation of litigants. See also, ibid, pp.189-190.

21. Thus, for example, when a debtor or a judgement debtor claims lack of means to pay, in theory he is to be presumed to be telling the truth; but, apparently because it is difficult for the creditor to prove otherwise, this rule has been revised in practice and the debtor has to prove his claim of lack of means. See Ibn Farḥūn, Vol. I., p.329. See also ibid p. 359, concerning documentary evidence, where Mutarriff and Ibn Mājashūn give an example of a particular type of fraud perpetrated by means of written evidence ("the like of which has been done before us - (and) this is one of the shortcomings ('uyūb) of documentary evidence".)

Part 1;

The Mode of Proof.

The quantum of evidence.

As has been pointed out above,[1] a party who has the burden of proving his case - i.e. the plaintiff in the majority of cases - must, in order to succeed, produce the minimum of the type of evidence required. The type and quantum of evidence necessary for the proof of each of the different cases must therefore be considered. A study of the authorities shows that for the purposes of the law of evidence the cases may be divided into six categories:[2]

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1. Chapter IV, p. above.

2. See, for example, Dardīr, op.cit., p. 185; Khirshī, op.cit. p.198; Ibn Farḥūn, op.cit Vol. I, p. 213; Mayyāra, op.cit., Vol. I, pp. 69-76; Ibn Abdul Salām, op.cit. Vol. I pp.86-119.

1. Cases which can only be proved by the evidence of at least two male witnesses;

2. Cases which may be proved by the evidence of one male plus two female witnesses;[3]

3. Cases which may be proved by the evidence of either one male or two female witnesses, plus the oath of the mashhūd lahū (the person who adduces the evidence and on whose behalf the evidence is given - i.e. the plaintiff in most cases);

4. Cases which may be proved by the evidence of two female witnesses alone.

5. Cases which may be proved by the evidence of children.

6. Cases which may be proved by documentary evidence.

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3. It should be noted that where women's evidence is admissible whether as complete or partial proof of a case, there must be at least two women, but it does not follow from this that, for example, four women could take the place of two men, because according to Sahnūn (see the Mudawwanā, op.cit, p. 165), there is no difference between "two and a hundred women" in this respect.

(There is a seventh cateogory, cases of zina and sodomy, which can only be proved by the evidence of four male witnesses. As these are criminal matters, however, they are left out of the discussion here. So, too, are cases where circumstantial evidence may suffice - for example, the proof of criminal drinking of alcoholic beverages by examining the contents of vomiting, or the proof of zina by pregnancy).

Circumstantial evidence for the proof of luṭk (some prima facie evidence upon which to found a claim) has already been discussed above.[4]

1. Where two male witnesses are required.

This is the highest standard of proof in civil cases, and is the standard required to prove non-proprietary civil cases. Thus to prove, for example, a marriage (or a rij'a), a divorce by talāq[5] or (subject to the rider below) khul[c], or a waṣiyya of (ijbār or non-ijbār) marriage guardianship or any

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4. See Chapter IV on Daawa. And for circumstantial evidence, see also Chapter V part B, pp340-1below.

5. Claims based on torts are also included under this category. Mayyāra op.cit. Vol. I, pp. 69-70.

other non-proprietary waṣiyyas or wakālas, at least two male witnesses must be produced. These cases need illustrations .

i. Marriage.

A man may claim that the father or a mujbir guardian of a girl has given him the girl in marriage and he may demand that she should join him. If the claim of marriage is denied he must prove it by two male witnesses. The defendant will not even be asked to swear the exonerative oath if the plaintiff produces only one witness.[6] Alternatively, a woman may claim that she is married to the defendant(and therefore, for example, is entitled either to maintenance or the sadāq). If the man denies the claim the plaintiff woman must prove it by two male witnesses.

ii. Rij'a.

The plaintiff, a man, may claim to have "returned" his divorced wife by rij'a; if the claim is made during the woman's idda period, no question arises, since rij'a may be by words or by deeds - for example, by the resumption of

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6. Dardīr, op.cit. p. 187; Khirshī, op.cit. p. 201.

cohabitation. If, however, he makes the claim after her idda period (i.e. if he claims that he had "returned" her during the idda), here he must prove the claim by the evidence of two male witnesses.[7]

Alternatively, the plaintiff may be a divorced woman who claims to have been "returned" by the defendant husband. She must prove her claim (whether made during or after her idda period) by the evidence of at least two male witnesses.

iii. Divorce.

As a general rule it is only a woman who would claim to have been divorced by her husband. This may be by talāq or khul^{c}. In either case the strict (two male witnesses) evidence is necessary.[8] However, if the claim is that the divorce was by khul^{c}, (a claim that may be made by either husband or wife), there may be two issues involved : whether there had taken place the khul^{c}, and for what or for how much consideration. The first issue is governed by the two-males-rule; the second is

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7. Dardīr, op.cit. p. 186; Khirshī, p. 2oo. Hayyāra, Vol I, pp. 70-71.

8. Ibid, and see the case of Salamatu v Idi Bango (below).

governed by the rule in proprietory matters.[9]

iv. Waṣiyyas and wakālas.

The same rule governs claims by a plaintiff that he had been appointed a marriage guardian of the daughter of the deceased - which daughter denies the claim; or that the plaintiff had been appointed by the deceased to administer and distribute the deceased's estate. Claims of wakālas, for example to conclude a marriage contract, or to handle a lawsuit, are also within this rule. But not commercial wakālās, for example to buy or sell - or even non-commercial wakālas, if a consideration is involved.[10]

2. Where one male and two female witnesses may suffice.

i. Contractual claims

This includes all claims of a proprietary or quasi-proprietory nature. In all/contractual claims, of whatever type of contract and concerning whatever type of property, "real"

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9. Ibid. See also Ibn Farḥūn, Vol. I, p. 213; Mayyāra, Vol. I, p. 71.

10. Dardīr, op.cit. p. 187; Khirshī, op.cit. p. 200.

or personal, corporeal or incorporeal (for example, the right to draw water in a particular well), one male and two female witnesses will suffice. The disputes may concern either the existence of the contract or the right itself - for example a contract of sale - or the price or the time of payment or repayment or even the right of option to buy (khiyār).[11]

ii. Certain claims concerning the death or proof of death of a person.

In addition to the contractual claims above, the following three claims concerning the death or proof of death of a person are provable by the evidence of one man and two women. First, proof of death of a man who dies (or allegedly dies) without leaving a spouse relict (and whose death does not operate to free a slave - for example an ummul walad).[12] However, if he leaves a widow, then the death must be proved by two males - because, according to Dasūqī and Adawī,[13] the proof of his death raises issues other than the purely proprietary

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11. Ibid.

12. Dardīr, op.cit. p. 188; Khirshī, op.cit. p. 203.

13. Dasūqī, op.cit. p. 189; Adawī, op. cit. p. 203.

ones involved in the distribution of his estate: If he leaves a widow, there arises also the issue of her idda.

Secondly, proof of survival among spouses. If both husband and wife are found dead but it is not known whether they died sumultaneously in a common calamity or not, or who died first, the question may arise of entitlement to inherit. It is a basic rule of the law of inheritance that (a) the death of the praepositus must be proved before the question of entitlement arises at all and (b) it must be proved that the heir on whose behalf a claim to inheritance is made has survived the praepositus.[14] To prove the survival of either spouse, in the circumstances, may be done by the evidence of one man and two women.[15]

Thirdly, proof of marriage to a deceased man. If a woman claims that she was married to a person who is now dead, and that the deceased died owing her the sadāq money (which she names), contrary to the general rule of proof of disputed marriages,[16] the woman can prove her case by the evidence of

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14. See, for example, Couslon, Succession, op.cit. pp. 195 and 201.

15. Dardīr, op.cit., p. 188; Khirshī, op.cit. p. 203.

16. See p. 252 above.

of one man and two women - both the marriage itself and the amount of the sadāq.[17] (And, as shown below, whenever the evidence of one man and two women will suffice, the evidence of either of these - i.e. either one man or two women - supplemented by the oath of the claimant will suffice.)

However, even more strangely, such proof entitled her to all the benefits of the allegedly unpaid sadāq as well as her share in the inheritance, without imposing upon her any of the usual obligations. Thus, she is not, for example, to observe the idda of mourning.[18]

This, according to Dasūqī, is Ibn Qāsim's view, and is the mashhūr. Asbagh, however, disagrees entirely : she gets nothing, according to him, unless she can prove the marriage - which can only be done in the normal way by two male witnesses.[19]

3. Where one male (or two females) plus the claimant's oath will suffice.

In all cases of category 2 above - i.e. in all claims of a proprietary or quasi-proprietary nature - if the claimant

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17. Dardīr, op.cit. p. 188; Khirshī, op.cit. p. 203.

18. Ibid.

19. Ibid.

is unable to produce both the one male and the two female witnesses, if he produces either one male or two females, he can supplement his insufficient evidence by his oath.[20] (The effect of his refusal to supplement the evidence with his oath is considered below).[21]

4. Where only two women will suffice.

> "In those matters" says Dardīr "which are outside the bounds of men"

two women will suffice.[22]

Four things are listed :

i. Proof of childbirth.

Whether a child has been born, the time of its birth, or who gave birth to it; .. All these are matters that may be of crucial importance in an inheritance case. So, too, is (ii) below.

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20. Ibid; see also Ibn Farḥūn, Vol. I, p. 213. Mayyāra, op.cit., Vol. I, pp. 71-74.

21. Chapter V, Part 2, below.

22. Dardīr, op.cit. p. 188. See also Khirsī, op.cit. p.202; the Mudawwanā, op.cit. pp. 157 and 158; Mayyāra op.cit. Vol. I, pp. 69 and 70.

ii. Istiḥlāl.

The crying of a new born baby. This may be important where it is desired to establish whether the baby was born alive or dead. The asl (i.e. the rebuttable) presumption in such cases, according to Dadūqī, is that the baby did not cry out when it was born.[23] Whoever claims it cried out after its birth (and that it is therefore entitled to inherit) must, according to the basic rule of inheritance mentioned above, prove his claim - which he can do by the evidence of two women.

iii. Claims concerning vaginal defects.

If a husband claims that his wife suffers from some physical vaginal defect (perhaps to avoid the payment of full sadāq on grounds of misrepresentation) what Dasūqī calls the asl presumption[24] is the woman's freedom from the alleged defect. We may observe that, although Dasūqī calls it asl, the woman's denial that she suffers from any such defects is final and conclusive. The question of how to prove it only arises if she agrees to be examined. If she does, the evidence of

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23. Dasūqī, op.cit. p. 188

24. Ibid.

two women will suffice.[25] This is also the case with claims concerning menstruation against a free woman. The question whether or not she has menstruated and if so when, may arise in connection with idda. Her word (that her idda is or is not complete) is final. The question of proof arises only if she agrees to be examined, in which case the evidence of two women will suffice.

5. Children's evidence.

Children's evidence is suspect and admissible only in two cases, and even then subject to restrictive rules.[26] It appears that the authorities are concerned about the possibility of "schooling" a child to say something different from what he perceived. Children's evidence is only admissible in cases of homicide and bodily injuries inflicted amongst the children themselves.[27] It is only admissible if the children have not been joined by some adult, male or female, at the

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25. Ibid.

26. Dardīr, op.cit. p. 183; Khirshī, op.cit. p.197; Ibn Farhūn, op.cit. Vol II, p.7; Mayyāra, op.cit, p.72; Ibn Abdul Salām, op.cit. p.115; the Mudawwana op.cit. p.163.

27. Ibid.

time of the event to which they testify or after it, before they testify.[28] They must be at least two and their evidence is only admissible if they are unanimous in what they say. If they differ, it is not admissible,[29] and the usual rules concerning adāla (discussed below) apply.[30] They are required to attain the age of discernment (tamyīz),[31] and only a child of at least "ten, or near ten", is competent according to these rules.[32]

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28. Ibid.

29. Ibid.

30. Ibid.

31. The age of tamyīz is, as a general rule, seven years (see, for example, Umar Abdallah, op.cit., p. 522, where he says "the non-mumayyiz child is the one who has not reached the seventh year of his life ..."). But the rules of evidence require a higher age - see footnote 32 below.

32. Some of the commentators insist on the age of "ten or near ten", which is based on Ibn Qāsim's authority. See, for example, Dardīr, op.cit. p. 134; Khirshī op.cit. p. 197; Ibn Abdul Salām, op.cit. p.115; Ibn Rihāl, op. cit., p.115. Others simply require tamyīz without stating any age for it, for example Ibn Farḥūn, Vol. II, p.8; Mayyāra, op.cit. p.72 and Tawadī, op.cit. p. 72.

6. Documentary evidence.

The Sharī'a authorities do not accord documentary evidence the sacrosancity accorded it today. The explanation of the attitude of the Sharī'a authorities is to be found, it is submitted, in the socio-economic circumstances and conditions prevailing in the environment of the ancient authorities. In the first place, literacy and the use of writing was not widespread among the ordinary litigating public in those days. Secondly, the use of transferable documents of title as valuable securities was not only unknown but might even be illegal under the Sharī'a.[33]

There was therefore the minimal use of documents and written evidence generally. And there was, in the early days, a good deal of suspicion and fear that sharp practices might be facilitated by the validation of documentary evidence. It was also feared that coercion and duress might be used to compel a person to make a written admission.[34] However, in later periods, it appears there was an inevitable relaxation of the

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33. As being a gamble.

34. See the discussion on this in Ibn Farḥūn Vol. I p. 357-8; see especially the views expressed by Ibn Hindī who distrusted documentary evidence because of the "corruption of the people of today."

harsh rule against documentary evidence for which a certain amount of commercial pressure might have been partly responsible.[35] We may also observe that in spite of their early attitude of almost total rejection of written evidence, the authorities are almost unanimous in their acceptance of documentary evidence in respect of what they call "ancient waqfs" and claims relating thereto.[36] Ibn Farhūn's explanation of this attitude towards the "ancient awqāf" is that it was due to the authorities' desire to protect and maintain the awqāf which may change in their nature and also because of the desire of the jurists to abide by the prohibition imposed by Mālik of selling or otherwise alienating the waqf property.[37]

However, documentary evidence never gained full acceptance.[38] Even the partial acceptance it gained is subjected

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35. The regional variations in attitudes towards documentary evidence seems to suggest that commercial pressures might have been brought to bear at different places at different times. The judges in the Ifriqīyyā (especially Tunis) area, for example, seem to be the first to accept documentary evidence. See the discussion in Ibn Farḥūn Vol. I. pp. 359-60.

36. Ibn Farḥūn Vol. I p. 360.

37. Ibid.

38. See for example the various dissenting voices noted by Ibn Farḥūn Vol. I p. 360.

to rules which restrict the ambit of its operation. And the authorities seem to have been at pains to justify any use of documentary evidence.

Thus, Ibn Hindī, whose view was that "it is safer" to reject documentary evidence in toto, but who was aware that practically everybody else agreed to its use in awqāf, said that whoever accepted it for the awqāf ought also to accept if for everything else since "all rights are equal before God."[39] Ibn Farḥūn makes a long list of arguments in favour of accepting written evidence. The major ones are : That Othman, Ali, Ṭalhā and Zubair and others of their calibre, testified to the authenticity of the written record of Othman's words, recorded by Marwān bin al Hakam. Second, that Abdallah bin 'Umar bin al-Khaṭṭāb made his bay'a to Abdul Malik ibn Marwān in writing. If documentary evidence was inadmissible, Ibn Farḥūn says, these people would not have used or accepted it.[40]

In spite of all the arguments marshalled by Ibn Farḥūn and others, however, documentary evidence has remained, as explained above, within a restricted scope, and is admissible

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39. Quoted in Ibn Farḥūn, op.cit. Vol. I, p.359; Mayyāra op. cit. Vol. I p.63.

40. Ibn Farḥūn, op.cit. Vol. I, pp. 359-60.

only in certain defined cases and subject to rules. It is admissible either as secondary evidence of the statement of an absentee witness (or a dead one), or to prove the admission of the claim or part of a claim by a party. It is also admissible as secondary evidence of the statement of a witness who is present in the court and recognises the writing as his but does not remember the details of the event about which his writing bears testimony.

Proof of admission - the handwriting of the muqir.[41]

A party may put in evidence a document recording the admission of the other as evidence of that other's admission. The person against whom it is sought to use the document (the muqir), may be in the court denying the fact or he may be absent from the court - far or near, dead or alive. Neither his absence nor his presence and denial of the contents makes any difference to the admissibility of the document provided the rules are satisfied.[42] Proof that the document was made or signed by him is complete proof of his liability as recorded

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41. Ibn Farḥūn, op.cit. Vol. I, p. 362; Mayyāra, op.cit. Vol. I, pp. 62, 64 and 66; Dardīr, op.cit. pp. 191-2; Khirshī, op.cit. p.206.

42. Dasūqi, op.cit. p. 192; Khirshī, op.cit. p. 206.

therein. But it must be proved that at least the operative (the admission) part of the document is in his handwriting. It is enough if he merely signs a document written by another, by saying, for example, "the admission above (or below) attributed to me is true."[43] And it is not necessary that the document or his signature be authenticated or attested by witnesses. It is not even necessary to state in it that witnesses were present when the iqrār was made.[44]

There are a number of divergent views on the type of evidence required to prove that the document (or the operative part of it, for example the signature) was made by the party alleged to have made it - the muqir. One view is that the same type of evidence to prove the transaction or liability admitted in the document is required.[45] Thus, if it is an admission of talāq it must be proved by two male witnesses. If it is a proprietory transaction, one male and two females may suffice. However, the view of Dardīr is that to prove handwriting two male witnesses are required because handwriting

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43. Dardīr, op.cit. p. 192; Khirshī, op. cit. p. 206.

44. Ibid.

45. See for example Ibn Farḥūn, op.cit. Vol. I. p. 362; Dasūqī, op.cit. p. 192.

evidence is in the nature of hearsay (naql) which can only be accepted (where it is admissible) on the evidence of two witnesses who testify that the hearsay statement or the writing in question was made by so and so.[46] But Hayyāra quotes a number of authorities to support the view that one witness suffices.[47] Another view, in fact, is that the alleged writer (the maker of the document) may be compelled to write something on a piece of paper so that the two writings may be compared if no other evidence is available. This is the view of al Lakhmiy.[48] Abdul Hamīd says the defendant may not be so compelled because this would be tantamount to forcing him to testify against himself. Ibn Farḥūn says the dominant view is the former - al Lakhmiy's.[49]

The best approach, it is submitted, is to allow the court to choose what evidence it would accept (including that of a handwriting expert) in order to prove that the document in question was or was not made or signed by the person who it is alleged was the maker of the document.

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46. Dardīr, op.cit. p. 192.

47. Hayyāra, op.cit. p. 68.

48. Ibid. See also Ibn Farḥūn, op.cit. Vol. I, p. 363.

49; Ibn Farḥūn ibid.

The document in question must be produced. But if it is lost, evidence may be given of both its loss and its contents.[50] An interesting aspect of this is that it is not necessary that the witnesses who testify that the writing is X's must know X. All they are required to know is the handwriting, and not the person.[51] This is because, according to Dasūqī,

> "we know most of the handwritings of our Sheikhs without knowing them in person ... " 52

Written evidence of an absentee witness.

The written evidence of an absentee witness is admissible provided the witness is either dead or is far away (as defined in Chapter II above on absentee defendants). A witness who is near must come to the court and depose; his handwriting is not acceptable in lieu of his attendance and giving evidence in court.[53]

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50. Dardīr, op.cit. p. 192; Khirshī, op.cit. p. 206; Dasūqī, op. cit. p. 192.

51. Ibid. This means in effect that a person who through exchange of correspondence knows another's handwriting can testify to it on the basis of his knowledge acquired through correspondence.

52.4 Dasūqī, op.cit. p. 192.

53. Dardīr, op.cit. p. 193; Khirshī, op.cit. p. 207; Mayyāra, op.cit. p. 64; Ibn Farḥūn, op.cit. Vol. I, pp. 358, 361.

In the same way, a witness may not send another person to testify on behalf of the witness by relating the story which the witness wishes to tell the court. Thus, in the case of Salamatu v Idi Bongo[54] the plaintiff claimed that her husband had divorced her by talāq, but she called only one witness, Iliyasu, whose evidence was reinforced by a message sent by his father supporting the plaintiff's claim. The Sharî'a Court of Appeal held that there was before the trial court the evidence of only one witness (which was insufficient) because the message sent by Iliyasu's father was inadmissible because of his failure to go and give evidence in person. The Court also held - rather obiter and rather surprisingly - that even if Iliyasu's father had gone to the court in person and testified, his evidence and that of Iliyasu, his son, would be treated as the evidence of one witness.[55]

The admissibility of written evidence of an absent witness is governed by the following rules :

a. The writing must be proved to have been made by the absent witness and it must be produced in the court because it has to

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54. Salamatu v Idi Bongo, Northern States Sharia Court of Appeal, Case No. SCA/CV.110/KC/67, 1967

55. See further discussion on this issue below, p.277

be proved in the same way as one proves a disputed ayn.[56]

b. The absentee witness (who made the document) must be proved to have died or to have gone far away. It must also be proved that he was a competent adl at the time he recorded the evidence and remained adl up till his death or absence.[57]

Can a witness use his handwriting as evidence ?

Suppose, for example, he was present during the transaction and records what happened, but later when called to testify he remembers the occurrence of the events but not the details and wishes to use his written records as aide memoire. Can he do so ? The dominant view is that he can.[58] If he remembers the details of the event, i.e. the contents of the document, then the question does not arise and he testifies on the basis of what he remembers. If, on the other hand, he

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56. See Ibn Farḥūn, op.cit. Vol. I, pp. 357-361; Dardīr op. cit. p. 193; Khirshī, op.cit. p. 207. But if it is lost or destroyed, the contents as well as the fact that the writing was made by the absent witness may be proved in lieu of the wiring.

57. Ibid.

58. Ibn Farḥūn op.cit. Vol. I pp. 364-5; Dardīr, ibid; Dasūgī, ibid; Khirshī, ibid; Mayyārā op.cit. p.61.

remembers only some of the details, the authorities are in full agreement that the document is admissible as proof of all the details of the event. Disagreement arises only where he forgets all the details. The earlier views seem to be that in such a case the document it totally inadmissible. But Mālik is reported to have held the view that he can put the document as evidence of the details - provided it contains neither erasures nor effacements on the face of it, and it is not surrounded by doubts and suspicions.[59] This view is also shared by Sahnūn and others,[60] and Mutariff is reported to have said it was the general practice and was permitted because it is recognized that lapses of memory do afflict human beings. Adawī is reported to have said :

> "If I recognize my handwriting, I testify by it - because I do not write unless I am certain." 61

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59. Ibid. But a different story (to the contrary) of Mālik(s view is given in the Mudawwana, op.cit. p. 145.

60. Ibid.

61. Dardīr, op.cit. p. 193.

Competence of witnesses.

Who is an adl (competent) witness ?

The above discussion is on the basis that the witness in each case qualifies, i.e. he is adult and trustworthy - an adl. It is therefore necessary to consider who qualifies as an adl witness. Since, as a rule, a witness will be disqualified if it is proved either that he is not adl (a general disqualification on grounds of competence), or that although he qualifies as adl, he is so related to one of the parties that his evidence is suspect - for example, because he is a near relative or a friend of the person for whom he testifies (the mashhūd lahū), or he is an enemy of the person against whom he testifies (the mashhūd alaihi).[62]

The rules regarding the adāla qualification are many and, but for the fact that the presumption is in favour of adāla,[63] hardly anybody would qualify today. Both Dardīr

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62. Dardīr, op.cit. pp. 164-170; Dasūqī, op.cit. 164-170; Ibn Farḥūn, op.cit. Vol. I. pp. 215-217; Mudawwana, op.cit. pp. 143-4.

63. See, for example, Ibn Farḥūn, op.cit. Vol. I. p. 328, and see also Umar's famous letter to al-Ash'arī (quoted in full by Ibn Farḥūn, op.cit. Vol. I. p. 28).

and Ibn Farḥūn as well as other commentators[64] mention the fact that the requirements are too many and say they can only confine themselves to giving some examples.[65] In this thesis - where unless care is taken to be brief one is in danger of digressing into a study of the law of evidence - it would suffice to say that an adl is a person who has all the qualities enumerated in Chapter II as being required of the judge, except ilm.[66] Such a person must be free from any major sinful vices - such as wine drinking - and keeps away from most of the minor ones, for example constantly playing chess and similar games like draughts, which, Ibn Farḥūn says, were, in his days, the pursuits of idiots only.[67]

Disqualifications.

Proof of lack of adālā, as we have seen, disqualifies a witness on general grounds of competence and he is disqualified

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64. Dardīr, op.cit. p.166, et seq; Khirshī, op.cit. p.133 et seq.; Ibn Farḥūn, op.cit. Vol. I pp.216-217.

65. Ibn Farḥūn, ibid; See also the Mudawwana, op.cit. p.143.

66. Ibid. See also Mayyāra, op.cit. p.512; Ibn Abdul Salām, op.cit. pp. 86-7; Tawādī, op.cit. p. 86; Ibn Āsim, op.cit. pp. 9-10.

67. Ibn Farḥūn, op.cit. Vol. I, p.221.

in toto. But even an adl may be disqualified on the following particular grounds:

i. Weak-mindedness (tagafful).[68]

This includes forgetfulness and generally bad memory.

ii. Interest in the case.

If the witness stands to gain some advantage by proof of a party's case, either by benefit accuring to him or obligation being removed from him, he is disqualified.[69] Thus, if a waṣī beneficiary (who knows of the waṣiyya) or an entitled heir, were to testify against somebody else in favour of the testator(or the relative) that the other owes the latter a debt, that other can successfully object to such a witness - because of the possibility of advantage to the witness.[70] (Another example, given by Ibn Farḥūn, is if a person is on a capital charge, he being rich, his heir cannot testify against him.[71])

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68. Ibn Farḥūn, op.cit. Vol. I, p. 223; Mayyāra, op.cit. p.50; Ibn Abdul Salām, op.cit. p.86; Dardīr, op.cit. pp. 166,7;

69. Ibn Farḥūn, ibid; Dardīr, op.cit. pp. 172-4.

70. Ibn Farḥūn, ibid; the Mudawwana, op.cit. p.165.

71. Ibid. Because, apparently, the heir stands to gain by having the charge proved against the accused.

If a debtor testifies in favour of his creditor this may be validly objected to because of the fear that he may try to curry favour.[72]

iii. Relationship to either of the parties.

The rules here are detailed, but we may summarise them as follows : relationship may be either sababīyan (for example by marriage) or nasabīyan, (i.e. by blood, for example parent/child).

1. A father may not testify for his son (or son's son) and vice versa, and the same applies for husband and wife.[73]

2. Brothers may testify for or against each other, except in matters where their family or family reputation is involved - since this makes them interested parties.[74] But even in this latter case there is disagreement - because, as some authorities point out, anything that affects a brother affects the whole family anyway, so that no differentiation should be made on the basis of this rule.

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72. Ibn Farḥūn, ibid; Dardīr, ibid;

73. Ibn Farḥūn, ibid; Dardīr, op.cit. p. 168;

74. Ibn Farḥūn, op.cit. Vol. I, p.224; Dardīr, op.cit. p.169;

3. Parents and children-in-law: there are two views on this, but the dominant view seems to be that they can testify for each other.[75]

Both father and son or two brothers etc. may testify for or against another person - though, again, some authorities say that both father and son should count as one. The Sharia Court of Appeal of Northern Nigeria has adopted this latter view in the case of Salamatu v Idi Bango mentioned above.[76] Thus, in short, the only definite rule seems to be that a father may not testify in favour of his child, or son's child, and in the rest of the cases the court has to use its discretion since the authorities (a) are divided sharply and (b) they all agree that

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75. See the various views mentioned in Ibn Farḥūn, op.cit. Vol.I, pp.224-5; and cf. Dardīr, p.168; Khirshī, op.cit. p.178

76. See p. above. It is submitted that this is an unsatisfactory view to adopt, especially since the authorities are divided and, indeed, the dominant view seems to be to regard father and son as two witnesses. Thus, Dardīr, (op.cit. p.168) follows the view of Khalīl that they both count as one witness, but Dasūqī points out that not only do other authorities (which he enumerates) disagree with this view, but the practice, in fact, was to regard father and son as two witnesses. He quotes both Ibn Farḥūn (op.cit. Vol. I. p.223) and Ibn Āsim (op.cit. p110) on this, both of whom also point out that the practice was to accord each of the witnesses a full status.

on proof of tabrīz (what we may call notoriety in adāla) such witnesses are competent and unchallengable except on grounds of adāwa.[77] There arises here, also the side issue of whether a son, or any of these relations, can testify before his father (or the corresponding relative in the case of the others) who is the judge. Again opinion is divided.[78]

iv. Enmity (adāwa).

If a party proves the witness against him is his enemy, this disqualifies the witness.[79]

v. Over-zealous witnesses/Eagerness to testify.

A person who is known to be over-eager to testify may be objected to.[80] Thus, a person who goes and offers to testify on behalf of a party who has not called upon him to

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77. See, for example, Ibn Farḥūn, op.cit. Vol. I, pp. 223,227; Dardīr, op.cit. pp.168-9; Mayyāra op.cit. pp. 51,2.

78. For example, Saḥnūn says this is valid and Asbagh says it is not. See Ibn Farḥūn, op.cit. Vol. I. pp. 223-4.

79. Ibn Farḥūn, op.cit. Vol. I, p.225; Dardīr, op.cit. p.171.

80. Ibn Farḥūn, op.cit. Vol. I, p.226; Dardīr, op.cit. pp.173-4.

do so, may be impeached on this ground.[81] The same rule applies in the case of a person who in his eagerness to have his evidence accepted starts by swearing that he is a truthful witness.[82]

Compellability of witnesses.

Since, as we have noted above, a party proves his case by the evidence of competent witnesses, the question arises whether competent witnesses are compellable. This question is especially relevant if it is remembered that most people are reluctant to be involved in litigation in any capacity, and that sometimes parties and witnesses may have to travel long distances to attend trials. The authorities themselves are aware of this reluctance of the public and of the inconvenience involved in litigation.[83]

The general rule is that competent witnesses are compellable. The authorities divide the issue into two :

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81. Ibid.

82. Ibid.

83. There are people, as Ibn Farḥūn notes (p.48) who regard involvement with the law as "a misfortune" and who consider it "easier to carry a mountain ... than to carry - i.e. give - evidence in court."

the duty to observe, to acquaint oneself with the facts (tahammul) and the duty to appear and depose when called upon to do so.[84] Both are fard kifāya, encumbent upon all members of the community competent in that behalf.[85] Some of the authorities say that the duty to acquaint oneself of the facts is encumbent on everybody - whether adl or not. But only adl witnesses are under the duty to testify when called upon to do so.[86]

The duty which is fard kifāya becomes fard ayn - encumbent on theparticular individual - in cases where there are no more than the requisite minimum number of individuals in the place and at the time. Such individuals must observe if called upon to do so by a party whose interests are threatened.[87]

The question arises whether the costs of the witnesses are to be borne by the party who calls them. The authorities are unanimous that a witness is not entitled to payment because

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84. See Ibn Farḥūn, op.cit. Vol. I p.205-6; Dardīr op.cit. p.199.

85. Ibid. Until the duty is performed by some member or members of the community.

86. This rule must be juxtaposed with the admonition against snooping and generally interfering in other people's affairs.

87. Ibn Farḥūn, op.cit. Vol. I, p.205-6; Dardīr op.cit. p.199.

there is an obligation upon him to testify.[88] However, if the witness has to travel some distance then the obligation upon him to come and testify drops, and the party for whom he testifies may pay for the expenses of the journey and all his other expenses.[89] (The obligation drops here in long distances because of the alternative method available to the party and the court - evidence "by commission").

There is also no obligation on the witness to testify in matters the legality of which he does not recognize. For example, a person may not be compelled to give evidence regarding a term in a valid marriage contract, whereby the deferred part of the sadāq is deferred for an indefinite period.[90] (According to Sahnūn such a person may not be compelled to testify even before a Hanafi court where the term is valid).

Finally, we may note that a witness may never be asked to swear. The rule is that if he is an adl, an oath is unnecessary to render his evidence admissible, and if he is non-adl an oath does not render his evidence admissible.[91]

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88. Dardīr ibid; Ibn Farḥūn, op.cit. Vol. I, p.208.

89. Dardīr, op.cit. p.200; Ibn Farḥūn, op.cit. Vol. I, p.208,209.

90. See Ibn Farḥūn op.cit.Vol.I pp.249-50.

91. See Ibn Farḥūn, op.cit. Vol.I p.50. Not only that but, as we have seen above, a witness who swears gratuitously renders his evidence inadmissible thereby. But this rule was later suspended - see below Chapter V., Part 3.

Part 2.

Trial Procedure.

It has been shown that when the parties are before the court and issue is joined, the plaintiff is called upon to produce hit witnesses and is given time in which do do so.[1] When the witnesses appear before the court, their full names, addresses and descriptions shall be written down by the court and the defendant is asked to raise what objections he has to raise against the witnesses. Three possible courses are open to him. He may raise no objections, and the witnesses will in such a case give their evidence. He may raise objections to any or all of the witnesses and get his objections sustained by proving the grounds for his objections; or he may object and fail to prove the allegations he makes against the witnesses.

a. Where the defendant raises no objections.

This is a straightforward case. The plaintiff's witnesses depose their evidenne, at the end of which the

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1. See Chapter IV above, Da'awa.

court asks the defendant again whether he has anything more to say. It is a basic rule that even when the defendant has no objections and has nothing to say, if he does not admit the claim, at the end of the plaintiff's case he has to be given another opportunity by being asked : "Dd you have any more submissions to make ?"[2] If he says he has none, judgement is passed against him.

b. Where the plaintiff brings the required minimum number of witnesses and the defendant raises objections.

Here the defendant is allowed sufficient time to produce witnesses to prove the basis of his objections (which may be based on general incompetence of a witness or a partial one based on, for example, enmity, friendship, etc. as shown above[3]). The rule here is that if he fails to prove this within the time given him the court will find against him and record the fact that he had raised objections to the plaintiff's witnesses, that he had been given time to prove the

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2. See the Mudawwāna, op.cit. p.132 Dardīr, op.cit. pp.148-9; Khirshī op.cit. pp. 158-9; Ibn Farḥūn op.cit. p.166; See also Jibir Dawra, op.cit. p.4.

3. Ibid and see Chapter V, part 1, above.

basis of his objections and that he had failed to do so.[4] This record will conclude the defendant's case against the plaintiff's witnesses and the defendant cannot have the case reopened on production of evidence later on to prove the lack of competence of the plaintiff's witnesses.[5]

The practice in courts in Northern Nigeria, as we have noted in Chapter III, does not always accord with the Sharî'a rules of procedure. In the case of trial procedure, however, an important issue arises, as to whether it is possible for the courts of today to follow the strict Sharî'a procedure to the letter and whether it is, from the Sharî'a point of view, compulsory for the courts to do so. It is submitted that it is not practicable for the courts to follow the Sharî'a procedure strictly. And it is further submitted that there are powerful juristic arguments and ample juristic authority in support of the view that the strict rules have to be suspended in certain cases and modified in others for the purpose of achieving the ends of justice. This issue is fully discussed in Part 3 below. The discussions, and the analysis

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4. Dardīr, op.cit. pp. 149,150.

5. Ibid.

of cases
and the criticisms/that follow in this Part are based on the strict Sharī'a rules of procedure.

Malam Maiwada v Malam Shehu.[6]

This was a case for the recovery of a piece of land. The plaintiff claimed he had been in undisturbed possession of the land in dispute, which he had inherited from his father, about fifty years previously. The defendant, who now ploughed up the land, claimed it belonged to him and he had been given it by his uncle.

What the court ought to have done was to ask the plaintiff to prove his case by the evidence of either two adl male witnesses; or one male plus two females; or either of these plus the plaintiff's oath.[7] But instead the court simply asked both parties to bring witnesses to testify on their behalfs. The plaintiff duly brought two male witnesses who supported his story in full; but the defendant raised an objection against the plaintiff's witnesses, on the grounds

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6. Case File No. 51/448/67, Chief Alkali's Court, Zaria, November 1967.

7. See Chapter V, Part 1, above.

that they were "friends and relatives of the plaintiff" and therefore their evidence was inadmissible. He also brought his own three witnesses who testified that the land in fact belonged to him. The plaintiff, in turn, objected to the admission of the defendant's witnesses' evidence on the ground that they had been "unfriendly to him for some time".

This procedure adopted by the court does not, of course, accord with the strict procedure laid down by the Sharī'a. The court should have asked the defendant who objected to the plaintiff's witnesses, to bring evidence to prove that they were "friends and relatives of the plaintiff".[8] If the defendant failed to substantiate his allegations against the plaintiff's witnesses within the time limit, then he should lose the case.[9] The court should give judgement for the plaintiff and the defendant would not be allowed to reopen the case later. The court should record the fact that he had raised objections to the plaintiff's witnesses, that he had been given time within which to prove the grounds for his objections, that he had failed to do so and judgement was given

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8. See above, foot note no. 3.

9. See Dardīr op.cit. p.149; Khirshī, op.cit. p. 159.

against him and he is therefore hereby disqualified from reopening the case.[10] The purpose of recording this, according to Dardīr, is to prevent the possibility of the defendant claiming afterwards that he had been denied his ("statutory") right of īzār.[11] If, however, the defendant's witnesses (to prove his impeachment of the plaintiff's witnesses) live far away from the court, then he is not to be given any time at all, and the plaintiff gets (provisional) judgement; the defendant retaining the right to prove his objections at a later date.[12]

The interesting thing in this case is that both parties have brought evidence each to prove his own ownership of the land. We shall see, below, that there are cases in which the court has to ask the parties each to prove his case. This, it is submitted, is one of the cases where this procedure might apply. The unfortunate thing here is the court's failure to give any reasons at all for the procedure it adopted and for its judgement. It simply listened to the evidence of each

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10. Ibid.

11. Dardīr op.cit. p. 150; Khirshī, op.cit. p.159.

12. See Dasūqī, op.cit. p.149; Khirshī, op.cit. p.159.

of the parties and arrived at the conclusion (from the general drift of the stories told by the parties and their witnesses) that the land had been abandoned for the previous twenty years and therefore neither of the parties had title to it and it reverted to the ownership of the community. The court ordered that the Chief of the village was to take possession of the land and allocate it to somebody else other than either of the parties.

As pointed out, if the court were to follow the Shari'a procedure strictly, it would have had to give judgement for the plaintiff. The rule is that the plaintiff has the burden of adducing evidence. Since he had discharged that burden, the defendant was only entitled to Īzār and on failure to impeach the plaintiff's witnesses, the case should end there, and he should not be allowed to call witnesses to prove his own title to the property.

This type of departure from the strict Shari'a procedure seems to be widespread among the courts. Thus, Jibir Daura, in his Memo, has drawn the attention of the judges to this particular type of "error". He says that Umaru Ibn Abdul Azīz's famous pronouncement[13] was never intended to be used as a means

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13. To the effect that : appropriate legal measures should be adopted to remedy new deviations. See Jibir Daura's Memo, p.6.

disregarding the rules of the Shari'a.

> "It so often happens that some Alkālis, no sooner the plaintiff finishes making his da'awa and the defendant denies, than they ask the parties each to bring his witnesses, for the plaintiff to prove his case and for the defendant to prove his denial ... This in spite of the clear principle that the mudda'i must bring evidence and the oath is upon the denier." 14

This practice, he says, is wrong and may only be applied in certain cases.

Even the High Court has had occasion to make a pronouncement against this disregard for the rules of procedure in a case considered below, an appeal from the Upper Area Court, Sokoto, to the High Court (Area Courts) Appeals Division. The High Court pronounced the evidence given by the defendant's witnesses in support of the defendant's denial of liability "of no valid consequence".[15]

Wamban Hunkuyi v Alhaji Ahmadu.[16]

This was a case of agency. The plaintiff had entrusted ten sacks of corn to the defendant who was to sell the same at

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14. Ibid.

15. See the case of Uwar Diya Zoramawa v Daje Alkanci below.

16. Case File No. 39/7/68, Chief Alkali's Court, Zaria, February 1968.

prices not less than £3 per sack. The defendant sold them at 30/- each and the plaintiff now sued for the difference. The defendant said that he was given a general authority to sell at the best price the corn fetched. The plaintiff called two witnesses, both of whom testified that they were present when the agency agreement was entered into, and that the defendant was specifically instructed by the plaintiff to sell only at £3 each or more, but not less. The court - presumably by way of īzār - asked the defendant if "he agreed with the evidence given by the witnesses".[17] The defendant said he did not because "one of the witnesses was an intimate friend of the plaintiff and the other was his brother-in-law".[18]

What the court should have done here is first to ask the defendant to prove his allegation that one of the witnesses was "the plaintiff's intimate friend" and, if the defendant proves this, then ask the plaintiff to swear an oath to supplement the other witness's evidence. The other witness, who was allegedly the plaintiff's brother-in-law, remains undisqualified because, even had this been proved or admitted - which is

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17. Ibid.

18. Ibid.

not shown to be the case from the records - it would not disqualify the witness.[19] And therefore the plaintiff had at least one witness in a case - proprietary case - provable by one witness plus an oath.[20]

What the court did, however, was to ask the plaintiff if he would agree to swear "to strengthen his case to the above effect" - which the plaintiff did and was given judgement. Now, unless the court meant by this that the plaintiff was to swear to supplement his one witness's evidence - which, again, is not shown to be the case in the records - the procedure is wrong, even though the result was the right result.

Another practice of the courts which does not accord with the Shari'a rules is the call on the plaintiff to supplement his sufficient but challenged evidence by an oath. In Malama Ramatu v Malam Hassan,[21] the plaintiff sued the defendant, her uncle, over a parcel of land which allegedly belonged to the plaintiff's deceased father.[22] The land had been pledged

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19. See Part 1 above.

20. Ibid.

21. Case File No. 81/62, Tudun Wada Native Court, Zaria, February 1962.

22. Which, presumably, she inherited.

by the defendant and the plaintiff asked the defendant to allow her to redeem the land from the pledgee. The defendant refused to do that and said the land in question in fact belonged to him and had never belonged to the deceased father of the plaintiff. The court therefore asked the plaintiff to produce witnesses to prove that the land did indeed belong to her late father. She called two witnesses who so testified. Thereupon the defendant requested the court to ignore the evidence given by the plaintiff's witnesses because they were his enemies.

So far so good. The court ought then to have called upon the defendant to prove his allegation of enmity against the plaintiff's witnesses. Failure to do so would then entitle the plaintiff to judgement and the fact of the defendant's having raised the objection and failed to substantiate his allegations should be recorded. But the court, instead, simply asked the plaintiff if she would swear and confirm her claim; she did and obtained judgement.

Cross-examination of witnesses.

Having said that the defendant has the right to challenge the plaintiff's witnesses, the question arises whether it is open to the defendant to ask the witnesses questions (by was of cross-examination) in order to prove that their evidence is inadmissible even though they do not suffer from any lack of competence. For example, among the grounds for impeachment of witnesses and their evidence are : that they testify in a matter of which they are most unlikely to have any knowledge;[23] or that they have some interest in the case in which they testify;[24] or that they suffer from tagafful.[25] All these are matters which can be proved by cross examination. It would seem that "cross-examination" may be permitted in these cases

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23. Ibn Farḥūn, op.cit. Vol. I, p.226, mentions this ground of impeachment and says it is based on the Hadīth of the Prophet that a bedouin's evidence is inadmissible against a sedentary town dweller. This has been interpreted by Mālīk to cover only matters the nomad is not likely to be acquainted with or to know enough about.

24. See Part 2 above,

25. Ibid.

if the issue is raised.[26]

After the plaintiff has proved his case and the defendant has failed to challenge the witnesses of the plaintiff, the court, before it passes judgement, must make īzār. It must ask "have you any further points to raise ?"[27] If the defendant says he has none then judgement is passed. If he says he has, he is allowed to state his points, unless he only wishes thereby to waste the court's time by delaying tactics. If this appears to be the case his reply is to be treated as ladad and ignored, and judgement passed against him.[28] (The same rule of īzār applies where judgement is to be passed against the plaintiff.[29]).

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26. Cross-examination of witnesses is not, as a rule, permitted under the Shari'a procedure. A witness is either competent or he is not. If he is competent, whatever he says is final. However, when such issues as tagafful and interest or partiality are raised, it is submitted that the witness may be tested on that score. We may observe here (a point discussed below in Part 3) that some of the ancient judges did resort to cross-examination of witnesses - and even to making them testify on oath; for example, Ibn Āsim and Ibn Bashīr (both of them in their judicial capacities). See Ibn Farḥūn, op.cit. Vol. II, pp. 145, 146, 149, and Part 3 below.

27. See footnote 2 above.

28. Ibid.

29. Ibid.- i.e. when he loses the case.

c. Where the plaintiff brings insufficient evidence.

The plaintiff may be unable to bring any witnesses at all; or he may be able to bring only one where two adl witnesses are required (or he may bring two and the defendant successfully challenges one of them).

i. Where the plaintiff brings no witnesses at all (or he brings what counts for nil - for example, any number of children, in matters not provable by children's evidence[30], or one woman[31]).

The case is to be resolved by means of the exonarative oath.

The exonerative oath.

Throughout the preceeding pages references have been made to the "exonerative oath". It is an oath which a defendant swears in order to exonerate himself from the claim against him. It is only available if the plaintiff fails to produce witnesses to prove the case, and it is subject to the following conditions.

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30. See Part 1 above p.

31. Ibid, and see the Mudawwana, op.cit. p. 158.

First, the defendant, before swearing the exonerative oath, may extract an undertaking from the plaintiff that if he swears the exonerative oath, the plaintiff shall not thereafter spring any witnesses upon him.[32] If the plaintiff agrees to this the defendant's oath is final. Secondly, the oath may only be imposed on the defendant at the plaintiff's request. It is not automatic and the court has either to wait for the plaintiff to ask for the defendant's oath or it must first ask the plaintiff whether the defendant should be sworn the exonerative oath.[33] This is apparently because the plaintiff is entitled to be given time to bring his witnesses before the defendant swears an exonerative oath. Thus, Ibn Farḥūn mentions a case (in the classical texts)[34] where a judge in his excess of zeal asked a defendant (who denied the plaintiff's claim) to swear the exonerative oath and go free. This was after the plaintiff had failed to produce any witnesses. When the defendant swore, the plaintiff complained, saying

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32. Khirshī, op.cit. p.156; Dardīr, op.cit. p.146.

33. Khirshī, ibid; Dardīr, ibid. Ibn Farḥūn, op.cit. Vol. I. pp. 46, 47.

34. Ibn Farḥūn, op. cit. Vol. I, p.47.

he neither authorised no accepted the oath and that he demanded it be repeated. The judge was in no doubt about his error and was equally in no doubt about the validity of the plaintiff's demand. But because it was unfair to ask the defendant to repeat the oath, the judge paid the 30 Dinars in dispute out of his own pocket. Another point is that when the defendant swears, the plaintiff or his representative must be there to witness the oath.[35]

Thirdly, the defendant may only be called upon to swear the exonerative oath after the plaintiff has proved khulṭa.[36] The rule is that on the plaintiff's bare claim against the defendant, unsubstantiated, the defendant may not even be called upon to exonerate himself, unless the plaintiff has at least proved to the satisfaction of the Law that there is a prima facie case against the defendant. To do this, the weakest evidence will suffice (unlike the proof of the full case). Even that of a single woman, or even circumstantial evidence - for example, the defendant's handwriting or signs

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35. Ibn Farḥūn, op. cit. Vol. I, p.192.

36. Ibn Farḥūn, op.cit. Vol. I, p.199. Dardīr, op.cit p.145; Khirshī, op.cit. p. 155.

of battery on the body of the plaintiff - will suffice.[37]

However, there are seven cases in which the plaintiff need not establish a prima facie case against the defendant before he is entitled to obtain an exonerative oath from the defendant. In these seven cases, the Law presumes the existence of khulṭa (contract, transaction).[38]

i. In cases against craftsmen or tradesmen - for example goldsmiths, carpenters or tailors. Where the claim against any of them is by a member of the public and in respect of their trade or business, there is no need to prove any prior khulṭa. The law assumes it against them on account of the nature of their trade or business:[39] Their invitation to the whole world to do business with them gives rise to the presumption of khulṭa. This class includes public custodiers in claims against them for bailment in respect of the things they keep

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37. Ibid. But not that of a disqualified witness.

38. Ibn Farḥūn op. cit. Vol. I, pp.200, 201; Dardīr, op.cit. pp. 145,6; Khirshī, op.cit. pp. 155,6.

39. Ibid.

for their clients.[40]

ii. A claim by a guest against his host or vice versa.[41] For example, the guest claims he has left behind some article in his host's house and that the host has converted it to his own use. (Or the host's claim that the guest has left with an article of the host's and has converted it). In either case the claim sticks and the defendant has to swear.

iii. Claims in respect of something tangible[42] including landed property. If, for example, the plaintiff claims that the cap, or gown, or shoes, the defendant has on him or uses, belongs to the plaintiff, here though there is no khulṭa, the defendant must swear.

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40. Ibn Farḥūn, op.cit. Vol. I p.199. Khulṭa has been defined, for the purposes of da'awa, to cover only business khulṭa and not, for example, fraternal or similar other khulṭa. It is therefore necessary for the plaintiff to prove this type of khulṭa even if the defendant is his close friend or is otherwise related to him. See Ibn Farḥūn, op.cit. Vol. I, p.200.

41. Ibn Farḥūn, op.cit. Vol. I, p.201; Dardīr, op.cit. p.145,6; Khirshī, op.cit. pp. 155,6.

42. Ibid.

iv. A claim by a traveller (in a group of travellers) against another that he has deposited something with that other for safe custody.[43]

v. A marīḍ (defined as a "dying person")[44] who claims the defendant owes him a debt.[45]

vi. Claim against the defendant that the plaintiff had bought from (or sold to) him something in the market place at a time when he was known to be at the place.[46]

vii. Claims against a suspicious person.[47] Thus, a claim of theft or conversion against a suspect among people, needs no proof of prima facie evidence.

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43. Ibid.

44. See Coulson, Succession, op.cit. p. 259.

45. Ibn Farḥūn, op.cit. Vol. I, p.201; Khirshī, op.cit. p.156; Dardīr, op.cit. p.146.

46. Ibid.

47. Ibid.

There are some authorities, like Ibn Nafī and Ibn Abdul Hakam, who take the view that it is not necessary to prove khulṭa before the defendant shall be compelled to swear.[48] Ibn Lubāba and others also "returned" to this view - because, they said, the famous Hadīth says "the mudda'ī must call witnesses and the denier must swear". Others say that the proof of khulṭa is only required if the defendant is a pious person who is unlikely to deny a just claim made against him.[49] But the dominant view is that proof of khulṭa is necessary before the defendant is obliged to swear the exonerative oath.

The defendant may refuse to swear the exonerative oath even though he denies the claim against him. In such a case the court "returns" the oath to the plaintiff. If he swears, he obtains judgement. If he too refuses, his claim fails and the defendant goes free.[50] But there is an exception

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48. See Ibn Farḥūn op.cit. Vol. I p.200. Mayyāra op.cit. p.20; Khirshī op.cit. p.155; Dardīr, op.cit. p.145;. Tawadī, op.cit. p.30 says this was the Andalusian practice and see Ibn Āsim, op.cit. p.4.

49. See, for example, the view reported in Ibn Farḥūn, op.cit. Vol. p. 199.

50. See below, p.303

in the case where a woman claims her husband has divorced her. If she can produce no evidence, the husband will not be asked to swear, because - says Ibn Farḥūn - otherwise any woman can claim this and the courts will be clogged with such baseless claims.[51] Another reason is that, as has been shown above, the woman in this case can get the case reopened later.

The following two cases may illustrate the exonerative oath. In these cases the procedure on the exonerative oaths was correctly applied although it was preceeded by the incorrect preliminary of asking both parties to bring their witnesses.

In Alhaji Yusufu v Duwa Mai Goro,[52] the plaintiff sued for the recovery of the sum of £35. 5s. od. being the price of kola-nuts which the plaintiff sold and delivered to the defendant on the agreement that payment was to be made in two months' time. The defendant admitted the contract, but denied the amount. He said he owed only £19. 0. 0. The court asked both

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51. See Ibn Farḥūn op. cit. pp. 128-9.

52. Case File No. 434/588, Chief Alkal's Court, Zaria, November, 1967.

parties to call their witnesses to prove their respective stories, but both failed to bring witnesses. Thereupon the court asked the defendant if he would swear the exonerative oath to the effect that he owed only the admitted £19. 0. 0. The defendant agreed and swore and judgement was entered against him for the admitted sum of £19. 0. 0.

There was khulṭa - admitted by the defendant himself; the plaintiff had failed to prove his case, and the defendant had agreed to exonerate himself by an oath.

The other case, Musa s/o Umaru v Dawai Tudun Wada,[53] is on all fours with the above, except that in the latter case when the plaintiff failed to produce evidence and the defendant was asked to swear the exonerative oath, he refused. When the oath was "returned" to the plaintiff he, too, refused. The court therefore gave judgement for the plaintiff for the sum admitted by the defendant rather than the sum claimed by the plaintiff.

Here again the exonarative oath had to be resorted to. Khulṭa had been proved; the defendant had been given the oppor-

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53. Case File No. 628/66 Tudun Wada Native Court, Zaria, October, 1966.

tunity to exonerate himself and he had refused; the plaintiff had been given the opportunity to confirm his unproven allegation by an oath and he, too had refused. The only course open to the court was judgement for the defendant.[54]

ii. Where the plaintiff brings only one witness.

Under (i) above the exonerative oath belongs as of right to the defendant who has the first refusal. It is only if he refuses to swear and go free that the plaintiff may swear and confirm his claim. And if he, too refuses, the defendant goes free.[55] Where, on the other hand, the plaintiff introduces the insufficient evidence of one witness, the procedure (under exonerative oaths, above) is reversed. The plaintiff is to remedy the deficienty by his oath after the one witness's testimony.[56] If he swears, that ends the matter. If he refuses to swear, the oath is to be "returned" to the defendant who swears and goes free.[57]

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54. See Dardīr, op.cit. p. 146; Khirshī, op.cit. p.156; Ibn Farḥūn, op. cit. Vol. I, p.184.

55. Ibid.

56. Dardīr, op.cit. pp.151,2; Khirshī, op.cit. p.161.

57. Ibid.

If the defendant, to whom the oath is "returned", also refuses to swear "the returned oath", the rule is that he becomes liable. His refusal to swear the "returned oath" to exonerate himself counts as evidence against him and supplements the evidence of the plaintiff's single witness.[58] In support of this rule is the maxim - no doubt designed to prevent a ping-pong game with oaths - that "a returned oath may not be returned twice over".[59]

However, if the plaintiff's claim is a matrimonial claim that depends on the proof of a marriage - as for example if the plaintiff claims against the defendant that the defendant had given his daughter in marriage to the plaintiff and the defendant denies this - partial proof will not entitle the plaintiff to anything. The rule is that wherever the contract of marriage is in dispute, whoever relies upon it must prove it strictly with at least the two required witnesses.[60]

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58. Ibn Farḥūn, op.cit. Vol. II, p.117, says this is no more than a piece of circumstantial evidence to buttress the evidence of the one witness. See also Ibn Farḥūn, op.cit. Vol. I, p.191.

59. See Dasūqī, op.cit. p.151.

60. Dardīr, op.cit. p.152; Khirshī op.cit. p.162. A rule to the same effect applies for a disputed ṭalāq divorce. See Chapter V Part 1 above p.

This, according to Dardīr, is because a marriage contract is not (or never should be) shrouded in secrecy; rather it is a highly publicised matter and therefore failure to produce a mere two witnesses throws the whole case into doubt and suspicion.[61]

Uwa Diya Zoromawa v Daje Alkanci.[62]

This is a case that came eventually to the High Court (Area Courts) Appeals Division in Sokoto, and the point of interest is the issue of insufficient evidence. The respondent, Daje Alkanci, was the plaintiff in the City Area Court, Sokoto, and had sued the appellant over a piece of farm land.

At the trial in the City Area Court, Sokoto, the plaintiff/respondent had alleged that the defendant/appellant who owned a parcel of farm land adjoining to the plaintiff/respondent's, had moved the boundary line into the plaintiff/respondent's land. The plaintiff/respondent was duly asked by the trial court to bring witnesses to prove his allegation, and he called three. However, of the three only one witness

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61. Dardīr, ibid.

62. Case No. NWS/13A/71, North-Western State High Court (unreported), February 1972.

claimed to know the boundary line and the court ordered him to go to the locus in quo together with the court's representative and the parties and show where the correct boundary line was. When this was done and they had all returned to the court room, the judge asked the defendant/appellant if she agreed with the plaintiff/respondent's witness's demarcation of the boundary line, to which the defendant said she did not. The court then asked the defendant if she could produce witnesses to prove the correct boundary line, and she called four witnesses, all of whom testified in support of her story. In addition to the four witnesses, a "Health Inspector" - an official of the Local Authority whose duties include demarcation of such boundaries - testified that he had, in his official capacity, demarcated the boundary and that the defendant's claim was the right one.

Upon this evidence[63] the trial court found in the defendant's favour and the plaintiff appealed to the Upper Area Court, Sokoto, against the decision.

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63. Which, viewed from the strict Shari'a procedure, was wrongly admitted because it is not open to the defendant in ordinary cases to introduce evidence to prove his denial. See above p.

The unfortunate thing about this case is that the trial court - the City Area Court, Sokoto - gave no reasons for its judgement. The judgement itself appears to be just and correct on the basis of the evidence received by the court. But the fatal defect in it, according to the appellate courts, was that evidence had been wrongly accepted from the defendant's witnesses.[64] As will be seen below,[65] this is a case that could have been decided on the basis of the rules on mutadāʿiyayn (conflicting claims to a thing) whereunder each party is entitled to call evidence to support his claim and the court is to decide on the basis of the best evidence. (But because the court did not base its decision on this, and it treated the case right from the beginning as an ordinary claim by the plaintiff and denial by the defendant, both appellate tribunals felt themselves obliged to "correct the procedural error" and reverse the decision on these grounds of a procedural technicality.)

The Upper Area Court asked the defendant/appellant to swear an oath that she had not moved the boundary as alleged

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64. Ibid.

65. See below, p.323

by the plaintiff/respondent, and she refused to do so. The oath was then returned to the plaintiff/respondent, who swore and was given judgement - reversing the trial court. It is against this judgement of the Upper Area Court, Sokoto, that the defendant/appellant appealed to the High Court (Area Courts) Appeals Division, Sokoto.

In appeals to the High Court, the appellant must state his grounds of appeal and in order to conform to this rule, the defendant/appellant gave two grounds, only one of which was considered of sufficient merit to deserve consideration by the High Court. It was

> "that the Upper Area Court erred in law in calling upon the appellant to take oath on the face of satisfactory and unchallenged evidence of her four witnesses in the matter". 66

The judgement of the High Court was read by Mr. Justice Muazu Muhammad. The Court itself was made up of Mr. Justice Jones, S.P.J. (presiding), Mr. Justice Muazu Muhammad, Ag. Judge, and Alhaji Haliru Binji, Deputy Grand Khadi.[67]

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66. Case No. NWS/13A/71, p.3.

67. The Bench of the High Court, when it sits as a court of appeal hearing appeals from Area Courts, includes a judge of the Shari'a Court of Appeal (see Chapter I, part 2, above) - hence the presence of the Deputy Grand Khadi in this case.

The Court referred to Sections 26(1) and 65 of the Area Courts Edict (which deal with the law of practice and procedure of the Area Courts) and Or. XI of the Area Courts (Civil Prodedure) Rules which provide/that the Shari'a procedure was to govern in effect the conduct of trial procedure in Shari'a courts in civil matters.[68] Since the "Moslem Law procedure" was to be applied (said the High Court)

> "the trial court should have therefore applied the provision of the well known Islamic Law procedural maxim from Tuhfah (69) namely : ... ... This means in English : 'It is upon he who asserts to prove and he who denies to take the oath'." 70

If this maxim had been followed by the trial court, continued the judgement, the defendant/appellant should have been called upon to take the exonerative oath when she denied the allegation. It was wrong to call upon her to produce witnesses to prove her denial, and, said the High Court,

> "since in law it was not open for the appellant to call any witnesses at the trial court in support of her denial, all the evidence given by the witnesses she was allowed to call in error must, in our opinion, be regarded as uncalled for and of no valid consequence." 71.

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68. See Chapter I Part 2 above.

69. i.e. of Ibn Āsim, op.cit.

70. Case No. NWS/13A/71, p.4.

71. Case No. NWS/13A/71, p.5.

The Court added that

> "it was quite proper ... for the Upper Area Court to have corrected that procedural error by calling upon the appellant to take the oath of denial. And when the appellant failed to do so, the Upper Area Court rightly called upon the respondent to take the oath in support of the evidence of her one witness to establish her case." 72

And the Upper Area Court's decision - the one appealed against before the High Court - was upheld.

This decision of the High Court itself, it is respectfully submitted, is based on an erroneous view of the strict Shari'a rules of procedure. The case concerns proprietory rights/claims; and is therefore provable by the evidence of either (a) two male witnesses, (b) one male and two female witnesses or (c) one male witness (or two female witnesses) plus the plaintiff's oath (which we may call the "complementary oath"). This has been discussed in Chapter V Part 1 above.[73] It was therefore wrong of the Upper Area Court which "corrected" the procedural error to have called on the defendant/appellant "to take the oath of denial" ("the oath of denial" here presumably means the "exonerative

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72. Ibid.

73. See Chapter V, Part 1, above, p.255 See also Jibir Daura, op.cit. p.8.

oath"). The correct procedure (if the strict procedure were to be followed) would have been for the court to call upon the plaintiff/respondent first to supplement her insufficient evidence by the "complementary oath". If she agreed and swore, she obtained judgement. It is only if she refused that the oath should be "returned" to the defendant/appellant who could swear and go free. If the "returned" oath was refused by the defendant/appellant, it could not be returned to the plaintiff, and the plaintiff would nevertheless obtain judgement.[74] The plaintiff was, in this particular case, entitled to judgement without her oath, on the basis of the rule that "a returned oath may not be returned twice over", and that the defendant's refusal to swear is itself, in law, considered additional evidence.[75] According to the authorities, when a plaintiff produces only one witness, the defendant is not liable until (the plaintiff having refused to swear) he refuses to swear the returned oath "because it is only then that his liability is confirmed."[76]

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74. See Chapter V, Part 1, above p. 304 and also footnote 58 above.

75. Ibid.

76. Ibid. See also Ibn Farḥūn op.cit. Vol. I p.191; Dardīr op.cit. p.151; Khirshī, op.cit. p.161.

This criticism, which is based solely on the consideration of the Shari'a rules, is not just hair-splitting. If the defendant who was wrongly offered the oath first had decided to take it, the plaintiff would have wrongly lost the case even though he is the one who should have the first refusal. However, a more serious criticism is that the appellate courts had allowed the procedural technicalities to defeat the ends of justice. In the first place, this case (and all similar land cases) lends itself, as pointed out above, to the mutadāʿiyayn procedure discussed below. If that procedure had been followed, the lower court would have been upheld. Secondly, even apart from the mutadā'iyayn procedure, the strict rules of the Shari'a procedure should be modified where the ends of justice so demand. This has been more fully discussed below.[77] Finally, it is submitted that appellate tribunals should occasionally turn a blind eye to "procedural errors" that do no harm to substantial justice in a case.

Another case of legally insufficient evidence is Gude Uman Goma v Garba Dan Auta.[78] It was a case of alleged

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77. Chapter V, Part 3, below.

78. Case File No. 808/67, Tudun Wada Native Court, Zaria, October, 1967.

conversion by a bailee. The plaintiff claimed she had entrusted 249 plates with the defendant for safe keeping, and the defendant had failed to make them over to her when she requested their return. The defendant denied ever having received the said plates or any plates whatever from the plaintiff. The plaintiff was duly called upon to bring her witnesses, and she called four women, two of whom supported her story and the other two gave merely heasay evidence.

Now, this is a case that raises two interesting issues. First, it is allegedly a case of entrustment, and the presumption is that an amīn's (bailee's) word is the truth provided that the entrustment was not made before witnesses. In this case no one was called by the plaintiff, at the time of the entrustment, to specifically bear witness to the event of handing over the goods entrusted to the defendant. This would mean, therefore, that the rule of accepting the amīn's word applies in this case. However, there arises the theoretical question : would the defendant qualify as an amīn, since he had denied the whole basis of the amāna ? If he had admitted receiving the goods, but either denied the quantities involved or claimed that he had returned them, then that would be a plain issue of amāna. But in the present case, either view may be taken, and since the practical

consequences of taking either view are the same, it matters very little : the plaintiff is the mudda'ī and must prove her case.

Secondly, the plaintiff, a woman, called only women witnesses, and the rule is that in proprietory matters at least one man and two women are required. The question here is whether the court should accept the evidence of women in this case on the pretext that it is a case that concerns women's property ? The plain rule of evidence requires one man and two women or either of these plus the plaintiff's oath. And it does not matter whether two or a hundred women were called : they still count for no more than what two women count for.[79] Strictly speaking the answer to this question is that the court cannot act solely on the evidence of the two women, but must call for its supplementation.[80] However, by recourse to the Siyāsa principle, women's evidence could be accepted in such a case.[81]

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79. See Chapter V, Part 1, above, p. 255 and see also footnote no. 3, Part 1.

80. Ibid.

81. See Chapter V, Part 3 below.

What the court did in this case was to invent its own rules. It called on the plaintiff to swear an oath in support of her claim, which she refused to do. The court then gave her up to seven days to think about it and see whether she would change her mind and swear the oath; but when the parties returned, after the seven days, the plaintiff still would not swear. The court therefore gave judgement for the defendant.

This case needs hardly any comments. It is unfortunate that the decision does not seem to have been appealed against. The disregard for any rules of procedure was complete, and the case simply cannot be upheld on appeal on any grounds. The court ought to have found for the plaintiff, unless it disbelieved the plaintiff's witnesses - which is not shown to be the case. The plaintiff was entitled to have the oath she declined to swear returned to the defendant, and if the defendant also declined to swear it, then the plaintiff obtained judgement - as shown above.

Šalisu v Ibrahim Muhammadu.[82]

This is a case in which no evidence was called and also the issue of amāna bailment arose The plaintiff had hired out his bicycle to the defendant for a specified period and for the fee of £1. The defendant returned without the bicycle and said he had been robbed of the bicylcle by some people who impersonated the police. He was not called upon to prove this and he did not offer to do so. The court said this was a case of bailment, and that the issue was one of amānā, and that the defendant, because he had been entrusted with the bicycle, had acquired the status of an amīn and therefore his story had to be believed, until the plaintiff proved it to be untrue. The plaintiff was not able to challenge the defendant's story with concrete evidence of witnesses, and the court therefore asked the defendant to swear the exonerative oath "affirming his innocence and absence of negligence or complicity". He agreed and judgement was entered for the defendant.

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82. Case File No18/17/67, Tudun Wada Native Court, Zaria, September, 1967.

The question that arises here is whether the hiring out of a bicycle to customers is an entrustment giving rise to the rule of amānā. It is submitted that it is not. The rule of amānā covers cases of bailment where the bailee is entrusted with the thing for custody. It does not cover the commercial hiring out of chattels for ijāra. The decision of the Court in this case is therefore based, it is submitted, on the wrong principles and premises.

Cases that must be supported by an oath.

We have seen that in all claims against the estate of the deceased the plaintiff must back up his evidence with the "judicial oath" (the yamīn-ul-qaḍā'i), the sīgha (mode) of which has been given above.[83] The following case, Yaya Mairo v the P.R.s of Ibrahim Na Ba Dikko (d),[84] is an example of a case where although the plaintiff has proved her case beyond doubt, she failed to obtain judgement because of her refusal to swear the "judicial oath". The plaintiff, the

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83. See Chapter III above.

84. Case File No. 291/67, Tudun Wada Native Court, Zaria, April, 1967.

deceased's widow, claimed that the deceased died owing her the sum of £47. 1s. 0d. She produced four male and one female witnesses all of whom testified that the deceased did receive the said sum from the plaintiff and died owing the amount. The court therefore called upon the plaintiff to swear the yamīn-ul-qaḍā'i, but she refused, and she lost the case.

Unfortunately, no mention has been made in the records as to who the heirs of the deceased were (apart from the widow). If the heirs had been named and described by the court, and if they were all of them adults (and rāshid), then the court could have dispensed with the "judicial oath" and could have given judgement for the plaintiff.[85]

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85. See Chapter III above, and see also Ibn Farḥūn, op.cit. Vol. I, p.136, where he quotes Ibn Sha'abān's view that in a case like the one under review, if all the heirs are adult and rāshid, "and they do not claim that the debt had been repaid ... then the yamīn-ul-qaḍā'i is not encumbent upon the plaintiff." And see the identical view expressed by Dasūqī, op.cit. p.162, and Adawī, op.cit. p.172.

Special Procedures.

In the preceding pages of this Chapter we have been considering the general trial procedure for ordinary cases. There are, however, some cases which are governed by either altogether different rules or by other rules in addition to the rules which we have considered above. Three special cases need separate treatment :

(a). Third Party Procedures;

(b). Interpleader and Mutadā'iyayn Procedures;

(c). The Li'ān Procedure.

a. Third Party Procedure.

The defendant may involve a third party in the proceedings. For example, the plaintiff may claim the ownership of something in the defendant's possession which he wants to have restored to him, and the defendant may reply by saying "I do not myself claim title to it; it is waqf property for the poor", or "it belongs to my son" or "it belongs to X". In such cases the plaintiff may be asked by the court to prove his title as against the nāẓir of the waqf, or, as the

case may be, against the son or his guardian.[86] But in the case of a third party owner, X, who is a total stranger, if he lives near by, he shall be summoned to the court and the matter resolved in one of three ways. The procedure here is that both X (the third party) and the defendant must each swear an oath : X to confirm the claim made on his behalf, and the defendant to confirm the claim he makes on X's behalf. If X swears affirming his title to the property (i.e. affirming the claim made on his behalf) he obtains judgement for the property; the defendant is then required to swear (the affirmative oath). If he does, that ends the matter : the property is adjudged as belonging to X and the defendant bears no further liability.[87]

The second possibility is that X (the third party) refuses to swear the oath to confirm the claim made on his behalf. In such a case, the plaintiff is entitled to the "returned oath". If he (the plaintiff) swears the "returned oath", he obtains judgement.[88]

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86. Who may be the defendant/father himself. See Ibn Farḥūn, op.cit. Vol. I, p.165; Dardīr, op.cit. p.231; Khirshī op.cit. p.240.

87. Ibid.

88. Ibid.

The third possibility is that X swears (and obtains judgement for the property) but the defendant refuses to swear affirming X's title. Here the plaintiff has the right to have the defendant's oath "returned" to him. If he swears he obtains judgement against the defendant for the value of the property.[89]

In either of the above cases, if the plaintiff refuses to swear the "returned oath", he loses his claim.

All this rather confusing process in third party claims involving a total stranger is apparently designed to prevent collusion. It would appear that the authorities entertain no fear of the possibility of collusion in third party cases involving awqāf or near relations or even neighbours.[90] In the case of these types of third parties (awqāf, relatives and neighbours), the defendant is simply struck off and the third party steps into the defendant's shoes to prosecute the claim on his own.[91]

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89. Ibid. (This is because the defendant, who brought the third party in, is held responsible for the "loss" suffered by the plaintiff).

90. Ibid.

91. Ibid.

(b). Interpleader and Mutadā'iyayn procedure

Although this could be treated under two separate heads, it is best considered under one head because the principles involved and the procedure are the same in both "Interpleader" and "Mutadā'iyayn" cases. "Interpleader" cases here mean cases where the subject matter of the dispute - the muddaʿī fī hi - is in the hands of a third party who claims no title to it and who does not support the claim to it of either of the parties in the dispute. He - the so-called "interpleader" - is quite happy to hand over the thing to whomsoever the court adjudges it for.

The Mutadā'iyayn, on the other hand, as the name itself shows, is the case where each of the two parties to the dispute claims that the subject matter of the dispute belongs to him, while the subject matter itself is either in the joint possession of both parties or it is in the possession of a third party who claims no title to it.

The procedure here[92] is that each claimant (in either the interpleader or the mutadā'iyayn case) is to call his

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92. See Dardīr, op.cit. p.223; Khirshī, op.cit. p. 233; Jibir Daura, op.cit. p.7; the Mudawwana, op.cit. pp.186-191.

witnesses to prove his ownership. The case is to be resolved in one of the three following ways :-

i. Where only one party brings evidence.

In this case the party that brings evidence wins. The other party, however, is entitled to his īzār and all the rules on īzār apply.[93]

ii. Where each party adduces evidence.

The rule here is that the court is to weigh the evidence of each party. The party with the best witnesses - i.e. the most reliable witnesses - as opposed to the party with more witnesses, wins.[94] It is the quality of the witnesses not their number that counts here. If neither of the parties tips the scales in his favour, the case is to be judges as in (iii) below where neither brings evidence.[95]

iii. Where neither party brings evidence.

Both parties are to be called upon to swear. If only

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93. Ibid.

94. Ibid.

95. Ibid.

one of them agrees and swears he gets judgement. If both agree and swear (or both refuse to swear) the thing is to be divided equally between them.[96]

Two observations should be made here. First, the claimants may each claim the whole thing - for example a parcel of land - or one of them may claim only a part of it while the other claims the whole of it. If the latter - i.e. if one party claims the ownership of a half and the other claims a whole, and they both fail to prove their respective claims by evidence - some authorities say the thing is to be divided equally between the two. However, others say the one who claims the whole of it is to be given two thirds, and the other party one third.[97] This, they say, is because the party who claims only a half has thereby acknowledged the other party's title to one half and the dispute so far as he is concerned is about the other half only. This is the dominant view.[98]

Secondly, this procedure, it is submitted, should be applied in most disputes concerning land which is either in

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96. See Dasūqī, op.cit. p.223; Adawī, op.cit. p.233.

97. Ibid.

98. Ibid.

the joint possession of the parties or where the dispute concerns the boundary of adjoining properties as in the case of Uwar Diya Zoromawa v Daje Alkanci above. In boundary disputes both parties may be said to be in the disputed possession of the area in dispute.

(c). Li'ān Procedure.

This is the procedure applicable where a husband accuses his wife of zina actually or by implication - for example by his denying the paternity of her child or that he was responsible for her pregnancy.[99] It is the presumption of law that a child born in wedlock at least six months after the consummation of the marriage contract and, (if the marriage ends) within four years of the dissolution of the marriage (or until the wife remarries, whichever first occurs) belongs to the husband. If the husband wishes to dispute the paternity of any such child, he can only do so by the distasteful procedure of li'ān. It is also by li'ān procedure that a husband can prove adultery against his wife, unless he can produce four male witnesses who can testify that all the

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99. Ibn Farḥūn, op. cit. Vol. I. p. 321.

four of them did, simultaneously, find the wife in flagrante delicto. (But it is difficult to see why a husband would wish to go through li'ān merely to prove adultery unless he wishes to dispute paternity.)

Before the procedure is embarked upon, the subsistence of a valid marriage must first be proved (in the manner stated above).[100] If a pregnancy or a child birth is involved, then the pregnancy or the birth must also be proved (again, in the manner indicated above).[101] When these are proved then the husband has to swear (in the mosque)[102] that he is telling the truth that he has seen her actually commit zina - i.e., he has seen her in actual adulterous sexual intercourse - or, as the case may be, that her pregnancy - or child - is not from him.[103]

He has to swear four times repeating this and on the fifth time invoke the curse of God upon himself if he has been telling lies in his allegations. After the fifth oath by the husband, the wife has to reply, as it were, by another set of five oaths.

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100. Ibid. And see Chapter V, Part 1 above.

101. Ibid.

102. Ibn. Farḥūn, op. cit. Vol. I. p. 190.

103. Ibn Farḥūn, op. cit. Vol. I. pp 321,322.

In each she swears that he (i.e. her husband) was telling a lie and that he had not seen her (i.e. caught her) committing zina (or, as the case may be, that her pregnancy - or child - is by him).[104] In the fifth oath she invokes the wrath of God upon herself if her husband was telling the truth. At the end of her fifth oath the marriage is dissolved and the pregnancy or the child is adjudged as not belonging to the husband.

We may observe here that the li'ān procedure is hardly ever used. Very few people indeed are willing to go through it. But claims giving rise to it do occur, especially pregnancies after the three months idda period. The rule is that when a marriage is dissolved the wife has to observe the idda period - the period of waiting for the purpose of determining if the woman is pregnant by her ex-husband. This is normally three menstrual cycles, but unless the wife remarries thereafter, her ex-husband is presumed presponsible for her pregnancy which occurs after the dissolution of the marriage and before she remarries, or before the expiry of the legally presumed maximum period of gestation. This period is five to seven years.[105] If the husband wishes to dispute this, he has to go through the li'ān procedure.

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104. Ibid.

105. See, for example, Coulson, Succession, op. cit. p. 23.

Thus, in the case of Halima Yar Sawaila v Abdu Dan Fani,[106] the plaintiff Halima was the defendant's pregnant wife. The defendant husband said he was not responsible for the pregnancy because although he was still in theory married to Halima, they had physically separated and lived separately for the previous three years. The court asked him whether the marriage had been consummated and he said it had. The court then asked him whether he had ever caught her in adultery, and he said he had not. Thereupon the court decreed that the defendant was responsible for the pregnancy and it made an order for the maintenance of the plaintiff, and the child whenever it arrived.

This was the correct procedure and the correct decision based on two principles. One of them is that the judge is required to draw the attention of either of the parties to any arguments or submissions in that party's favour which the party either does not know or does not advert to.[107] In this case the court stood firmly by the woman plaintiff and asked on her behalf the relevant questions

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106. Case File No. 15/67, Zaria City Native Court, January, 1967.

107. See Ibn Farḥūn, op. cit. Vol. I, p. 42; Mayyārā op.cit. Vol. I. pp. 27-28.

which she herself might have asked. However, although the question whether the marriage had been consummated is a relevant question, the question whether he had ever caught her in adultery is quite irrelevant.[108]

The second principle is that it is only by li'ān procedure that a child born (or a pregnancy conceived) within the "statutory marriage period" can be repudiated by the husband.

Another case on li'ān is Umma v Mudi Abdul Lahi.[109] The plaintiff was the defendant's ex-wife. Six months and seven days after the dissolution of the marriage the plaintiff gave birth to a child. However, two months previous to the birth she had remarried - after, according to her, observing a period of idda. Her second husband refused to accept the child as his. The plaintiff therefore sued the defendant, her ex-husband, claiming that the child was his. The court found no difficulty in fixing the paternity of the child with

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108. Because if the marriage had not been consummated - actually or presumptively by proof of valid khilwa - the defendant would not be held responsible for the pregnancy. But once consummation has been proved or admitted, it is immaterial whether the defendant had ever caught the plaintiff in adultery or not. He would still remain responsible for the pregnancy unless he elects to go through the li'ān procedure.

109. Case File No. 420/67, Chief Alkali's Court, Zaria, November, 1967.

the ex-husband on the basis that, according to the court, the period of gestation "is between four to five years".

Other matters of trial procedure.

a. Where the judge knows the facts to be different from what the witnesses say.

The judge here must not adjudicate in the matter.[110] He must transfer it to another judge and be a witness himself where he can usefully be a witness. The rules and the procedure for the transfer of cases under the Northern Nigerian Area Courts enactments have been discussed in Chapter I above.[111]

b. Where the claim is based on an illegal transaction.

Under the Shari'a, no cause of action is disclosed and the case is to be dismissed. But this is not necessarily the case in Northern Nigeria today. For example a claim for the interest upon a loan given by the plaintiff to the defendant is not actionable under the Shari'a and the Shari'a courts

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110. Ibn Farḥūn, op.cit. Vol. I, pp. 248-9.

111. Chapter I, Part 2, above.

will not entertain such a claim. But the plaintiff, if he is a licenced money lender, under the Money Lenders' Law, can prosecute his claim in the District Court. The Shari'a courts will simply decline jurisdiction, but the plaintiff can go somewhere else. Thus, in the case of Iyani Muhammad v Binta Bature[112] the plaintiff sued the defendant for the repayment of a loan of £27. 0. 0. The defendant admitted the loan but denied the amount. She said she had received only £21. 0. 0., and had agreed to repay £27. 0. 0., £6. 0. 0. being interest on the loan. The court asked the plaintiff whether her claim arose out of the sale of goods to the defendant or whether she gave the defendant a loan of cash. The plaintiff said she gave the defendant a loan of cash. Apparently the plaintiff had, in the course of the proceedings, admitted that she gave the loan only of £21. 0. 0. and therefore the £6. 0. 0. was interest. The court then asked the plaintiff if she was a licenced money lender, and she said she was not. The court therefore informed the plaintiff that the agreement to pay interest was void and unenforceable by the court. She was entitled to judgement for the sum of £21. 0. 0. only.

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112. Case File No. 235/320, Chief Alkali's Court, Zaria, July 1967.

But the court commented that if the plaintiff was a licenced money lender, she might be able to enforce the agreement by proceedings in the District Court - but never in the Shari'a courts. It was also pointed out that if it was goods which the plaintiff sold to the defendant at an inflated price on a credit sale agreement, that would be enforceable.

c. Where the judge fails to grasp the issues at stake in the proceedings.

Where the judge, after listening to the plaintiff's claim which the defendant denies, fails to grasp the issues raised, he is not to adjudicate in the matter.[113] The failure to grasp the issues may be due to his failure to follow complex facts - either because there are too many details of a technical nature, or because of the long-winded stories involved, or for any other reason.[114] Here he should endeavour by listening to the parties repeatedly, until he gets at the root of the matter; he is not to act according to his imagination of the facts, but only on the facts as deposed before him.

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113. Ibn Farḥūn, op.cit. Vol. I., p. 38; Mayyāra, op.cit. Vol.I, pp. 26-27.

114. Ibid.

If, however, the judge understands the facts but is confused on the law to apply - on the legal rights involved - he should not adjudicate in the matter, but transfer the case to another judge who may be able to try the case.[115]

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115. Ibid.

Part 3.

Conflict between theory and practice.

If we examine the practice of the courts on the basis of the strict Shari'a rules of trial procedure we are bound to find (a) that the courts do not observe the rules strictly and (b) that to insist on a strict observance of the rules in modern times is likely to lead oftentimes to unjust decisions.[1] Such injustice may result, for example, because the court, in accordance with the rules, refuses to admit what in the circumstances, is the best available evidence.[2]

The problem that should engage our minds today, therefore, is how to devise practical procedural rules that lead to just results without abandoning or going outside the Shari'a.

It has been observed that the ancient authorities were at pains to keep the qādī out of involvement with the investigative processes of judicial work : the parties themselves (by means of the various oaths) and the udūl

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1. See, for example, the case of Uwar Diya Zoromawa v Daje Alkanci, Chapter V, Part 2, above.

2. Ibid.

witnesses have to do the dirty work.

Political authorities, however, from the very earliest times, were aware that rigid adherence to the narrow legalism imposed by the Shari'a rules of trial procedure did not always serve the ends of administration of justice in the wider context. And because of the fusion of state powers and functions in Shari'a constitutional theory, the political authorities were able to devise rules, and establish extra-magisterial jurisdictions, to cope with the practical needs and demands of society. Hence, the much discussed Siyāsa jurisdiction developed, together with some new state functionaries, the walil-jarā'im, the walil-mazālim, and the shurṭa. But even before these institutions became fully fledged arms of the Islamic state system, departure from the narrow rules of procedure was not unknown. Ibn Farḥūn gives some instances of this, but the best example of suspending the rules in order to arrive at the facts and achieve just results, is the story quoted by Sheikh Abdullahi concerning Ali and Shurayḥ.[3]

It is a long story about a group of people who had been brought before Qāḍī Shurayḥ on suspicion that they had

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3. Ḍiyā'ul Hukkām, op.cit. pp. 88-90

killed one of their number while they were on a journey abroad with the victim. They denied the charge and as the requisite evidence was not available Shurayḥ, quite properly, asked them each to swear the exonerative oath, which they did. As far as Shurayḥ was concerned that settled the matter.

Ali, however, was not content to let the matter rest there. He therefore ordered their rearrest and their detention, every one of them detained separately. He then summoned them one by one and thoroughly cross-examined each one of them, each telling a different story. Eventually the true story of what happened to the victim and his property emerged and Ali ordered the restoration of the property to the victim's heirs and the punishment of the assailants.

This is said to be one of the juristic bases of the siyāsa jurisdiction which is primarily based on istihsān, although some authorities base it on the authority of the Qur'ān and the Sunna.[4]

This shows that the Shari'a rules have always had to be supplemented by other methods and procedures. This was

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4. See Ḍiyā'ul Hukkām, op.cit. p. 86. Ibn Farḥūn, op.cit. Vol. II, p.133 et seq.

done quite liberally by the Mazālim and the Jarā'im jurisdictions, especially in delictual matters. The authorities are unanimous as to the competence of these jurisdictions as well as the legal validity of their procedures.[5]

Quarāfī gives two lists of differences in jurisdiction and powers between the qāḍī on the one hand and the Mazālim and Jarā'im on the other. The main differences, as shown in the lists, are that the latter have "more power and prestige". They can rely (and act) on circumstantial and other strictly inadmissible evidence, and they take a far more active part in investigation, including compelling witnesses to swear if they doubt their adālā.[6] Commenting upon this, Ibn Farḥūn argues that the law does empower the qāḍī to use these methods and he gives a number of examples of eminent judges

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5. See, for example, Ibn Farḥūn op.cit. Vol. II, p.142. They are the undisputed possessors of siyāsa jurisdiction par excellence, although some authorities claim that the siyāsa powers belong primarily to the qāḍī and it is only because of the corruption and injustice of the political authorities that the siyāsa powers were given to the Mazālim and Jarā'im jurisdictions.

6. See Ibn Farḥūn, op.cit. Vol. II, pp. 142-146.

who used these methods.[7] He also cites various authorities in support of the validity of the view. He then concludes the argument by saying that Qarāfī cannot have been relating the position of the Mālikī School in these matters.[8]

Qarāfī himself is also quoted as saying that because of the change of the times, methods have to change. The qāḍīs and the Imāms of today would not have qualified in the earlier days, and therefore what would have been wrong in those days need not be wrong today.[9]

Ibn Abī Zayd says we have to make the best use of what we have by way of shuhūd and judges today, in order that rights are not nost.[10] He concludes his argument by saying that because of the corruption (fisād) of our time, which has become all-pervading, the liberal use of siyāsa methods becomes permissible.

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7. For example Ibn Āsim and Ibn Bashīr. The former was the Qāḍīl-Jamā'a of Andalus, who in his departure from the rules of procedure went to the extent of making parties swear by ṭalāq. The latter was - according to Jung, (Administration of Justice of Muslim Law, London, 1926, p. 34) - the Qāḍil Quḍāt of Muslim Spain. According to Ibn Farḥūn, Ibn Bashīr demanded of witnesses to testify on oath. See Ibn Farḥūn, op.cit. Vol. II, p. 145.

8. Ibid. In other words, since according to the Mālikī School it is perfectly in order for the qāḍī to resort to all the procedural expedients employed by the other jurisdiction, there is no difference between the two.

9. Ibn Farḥūn, ibid, p.151; Ḍiyā'ul Hukkām, op.cit. pp. 24-28.

10. Ibid.

One could go on citing authorities in support of the use of the wide and more flexible methods of siyāsa by qāḍīs; but this should not be necessary for the purposes of the Northern Nigerian qāḍīs of today. This is because they (as well as all other Area Court judges) unite in themselves all the extra-magisterial jurisdictions listed above as well as that of the qāḍī.[11] Since the judges have all the powers, there is no reason why, in the exercise of their siyāsa jurisdiction they should not suspend or modify the rules of procedure from time to time as occasion may demand, and decide cases on the basis of the best available evidence - whether it is witnesses, documents or circumstantial evidence.

There is a good deal of Shari'a authority to the effect that circumstantial evidence is as much acceptable evidence as any other type of evidence. Ibn Qayyīm has been cited with approval when he says that the word bayyinā as used in the Qur'ān does not mean witnesses (shuhūd) but it primarily means proof (burhān), cause (hujjā), reason (dalīl).[12]

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11. No other State officials have or exercise any judicial powers today. The Emirs did have judicial powers, but these have been taken away by the Area Courts Edicts of 1967.

12. See Ibn Farḥūn, op.cit. Vol. I, p. 202.

Qāḍī Ismā'īl points out that the famous Hadīth which says that the mudda'i must bring bayyinā does not mean, by bayyinā, exclusively witnesses. It includes other types of evidence where witnesses are not available.

Both Ibn Qayyīm and Qāḍī Ismā'īl mention, as their authority, the Qur'ānic story of the Prophet Yūsuf where circumstantial evidence had been relied upon.[13]

Two observations should be added to the above arguments. First, the qāḍīs of today in Northern Nigeria are of a quite different ethical-psychological temperament from that of the ancient jurists who shunned and avoided all State offices, especially the judicial office. The qāḍīs of today, as has been shown above, actually apply for the office in most cases,[14] and in the few cases where they do not apply for it but are invited to take it, the invitations are accepted with what the ancient jurists would regard as the most indecent haste. Secondly, the full judicial paraphernalia of udūl and muzakkīs is absent in the judicial apparatus of today, so that it would in any case be difficult to adhere strictly to

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13. Ibid. The Qur'ān, Chapter 12, verses 26-28. See Muhammad Ali's translation, Basingstoke, England, 1951, p. 238.

14. See Chapter II, Part 1, above.

the rules and apply them in their full rigour, especially since the judge cannot, today, be expected to know and be able to vouchsafe the adālā of the witnesses who testify before him. In these circumstances, if they do not play an active role in the procedure, there can only result injustice by default. It is necessary, therefore, for the courts of today to assert themselves and take an active part in trials. This can be done properly within the rules and provisions of the Shari'a, by resort to siyāsa and istihsān and by reliance upon the various textual authorities, some examples of which have been given in this Chapter.

However, to permit unrestricted use of siyāsa methods may lead to abuses of it; and it is equally undesirable to tie the hands of the judges to another set of rigid rules of trial procedure. The best approach, it is submitted, would be to empower the judges and call upon them to follow the procedure laid down in Order 11 rr. 7-10 of the Area Courts (Civil Procedure) Rules whenever, in their opinion, this would better serve the ends of justice. The aforementioned rules provide in effect that at the end of the plaintiff's case (if a cause of action is disclosed) the defendant is to be called upon to make his defence and he :

> "shall be entitled (a) to give evidence, (b) to call witnesses, and (c) to address the court at the conclusion of the evidence for the defence." 15

When the cases for both sides have been closed, the court is then to

> "consider the whole matter and give its decision ... " 16

The adoption of this suggestion will not lead to any radical departure from the principles and the spirit of the Shari'a. The probable consequence will be that a great many cases, perhaps most cases, will be decided on the basis of preponderance of evidence, the balance of probabilities. And this, as has been shown above, had been envisaged and anticipated by the Shari'a authorities, and had in effect been recommended even for the qāḍīs (let alone the extra-magisterial jurisdictions). Hardly any tears need be shed over such an enactment even by the most orthodox literalists, and no justifiable charges of erosion of the rules of the Shari'a can be made.

It is appropriate to conclude this Chapter by recalling the cases reviewed and affirming that the analysis and the

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15. Or. 11 r. 8.

16. Ibid, r. 10.

criticisms made of them remains valid from the point of view of the strict Shari'a procedure. However, from the point of view of practical administration of justice for the purposes of modern day needs, different terms of reference are required. The question should not be whether the Shari'a procedure has been strictly adhered to, but rather whether the ends of justice have been served, and if it is necessary to suspend some of the rules to attain the ends of justice, this should be done. If this is borne in mind, decisions like that of the High Court in the Zoramawa v Alkance case would, in future, be avoided, and the Sokoto City Area Court's decision and procedural approach in the matter would be upheld.

CHAPTER VI
GENERAL MATTERS

Part 1 - Ṣulḥ and Arbitration

1. Ṣulḥ ("reconciliation"or "settlement").

Ṣulḥ has been defined by Ibn Arafā as :

> "the forbearance of a right or a claim for a consideration (ʿiwaḍ) for the purpose of achieving a settlement of an actual or a potential dispute" 1

We have seen that ṣulḥ has, on occasion, been recommended as a way out of procedural dilemmas.[2] This aspect of ṣulḥ still remains one of its features and the judge is still required to recommend reconciliation to the parties in civil cases. However, some rules have developed on the issue of what cases it may be recommended in. These rules may be summarises as follows :

Ṣulḥ is to be recommended in four cases :

a. In suits involving parties who are either related to each

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1. Quoted by Mayyāra, op.cit. Vol. I, p.143.

2. See Chapter V Part 1, above.

other or involving "impious people".[3]

b. In cases which confuse the judge.[4]

c. In cases in which the judge fears that adjudication may lead to civil commotion or unrest.[5]

d. Generally in cases where "the rights appear to be equal".[6]

a. Suits involving relatives and "impious people".

This is based on the authority of Omar.[7] He is said to have recommended that in cases involving such people reconciliation is to be imposed on them. This may be done, if necessary, even by such measures as repeated adjournments - with the view to annoying the parties out of litigation.[8]

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3. Ibn Farḥūn, op.cit Vol. I, p.38; Dardīr, op.cit. p.152; Mayyārā, op.cit. Vol. I, p.27; Khirshī, op.cit. p.162.

4. Ibn Farḥūn, ibid; Mayyārā, ibid; Ibn Abdul Salām, op.cit. p.37; Ibn Rihāl, op.cit. p.27.

5. Ibid.

6. Ibid.

7. See Ibn Farḥūn, op.cit. Vol. I, p.38; Vol.II, p.144.

8. Ibid;

Sahnūn is reported to have sent out of his court two of his good neighbours who came before him to litigate. He told them, in effect, not to wash their dirty linen before him.[9]

However, the rule about the imposition of ṣulḥ became watered down so much that it finally became only a preliminary to the actual trial of the case. Thus, the rule now is that the judge is to recommend ṣulḥ in these cases and he may even go through the motions of repeated adjournments. But (a) he should not adjourn a case more than twice in the hope of eventual ṣulḥ; and (b) if one of the parties is obviously in the wrong, then even the two adjournments are not necessary and the case may be tried straight away.[10]

b. Cases which baffle and confuse the judge.

The rule, as stated above,[11] is that the judge should try to grasp the issue if he can. If he fails to do so he should transfer the case to another judge if there is one near by, and reconciliation may only be resorted to if it

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9. Ibid; see also Khirshī, op.cit. p.162.

10. See Ibn Farḥūn, op.cit. Vol. I, pp. 38-39; Mayyāra, op. cit. p. 27; Ibn Abdul Salām, op.cit. p.37.

11. See Chapter V, Part 2, above.

is impossible for him to adjudicate the issue.[12]

c. Cases where the judge fears civil commotion.

The attitude adopted by the authorities here is that if adjudication will result in greater harm, either to the parties or to the community at large, then sulh is to be recommended. This is the one case where sulh may, if necessary be imposed, even if the justice of the case does not suggest sulh.[13]

d. Cases where the rights appear to be equal.

Where the rights in the case appear equal, even if no fear of greater harm from adjudication is entertained, the court should encourage ṣulh on the grounds that litigation should, as far as possible, be avoided.[14]

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12. The authorities suggest three possible courses of action for the judge : (1) to obtain the assistance of other learned people if there are any within the area; (2) to transfer the case to another judge if there is one within the area; and (3) as a last resort, ṣulh. See Ibn Farḥūn, op.cit. Vol.I, pp. 38-39; Mayyāra, op.cit. p. 27.

13. Ibid.

14. Ibid. See also Dardīr, op.cit. p.152; Khirshī, op.cit. p.162.

2. Tahkīm - Arbitration.

The area Courts (Civil Procedure) Rules empower all Area Courts to refer a cause to arbitration if the parties wish this to be done. The Rules also provide that the court may enforce the award of the arbitrator as though it were the court's judgement or, if it thinks fit, disregard the award and try the case itself.[15]

What are the Shari'a rules on the subject of arbitration ? Arbitration is permissible only in civil cases involving proprietory claims.[16] It is not permissible in matters of divorce by talāq,[17] nasab (affilitation or lineage) and liān proceedings.[18] These have been excepted on the grounds that arbitration is based on the agreement of the two parties to a dispute. These parties cannot by means of abbitration interfere with the rights of third parties without the

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15. The Area Courts (Civil Procedure) Rules, 1971, Or.12, rr.13,14.

16. Ibn Farhūn, op.cit. Vol. I, p.55; Dardīr, op.cit. p.136; Khirshī, op.cit. p.145; See also a Commentary on Khalīl by Abil Asharī: Jawāhirul Iklīl, Kano, Nigeria (n.d.), Vol 2, p.223.

17. Ibid (But khul^{c} does not, of course, fall within this category).

18. Ibid.

consent of those third parties.[19] Thus, in liān and nasab, third party rights of the child may be involved. In talāq the rights of God are involved because it is not open to anybody to make a divorced woman (bā'in divorce) return into her ex-husband's matrimonial "potestas" and "recall power."[20]

The parties to the dispute must agree both to arbitration and to the aribtrator. Once they have agreed upon these and the arbitrator starts hearing the case, neither party may withdraw and the arbitrator's award binds the parties.[21]

The arbitrator must be an adult male who possesses all the qualifications required for appointments to judicial office, including learning.[22] This is the dominant view. But if a person who does not fully qualify - for example a fāsiq - arbitrates, his award is to be executed if it is not plainly unjust nor against the law.[23]

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19. Ibid.

20. Ibid. But even in these, if the parties refer the matter to an arbitrator and if the arbitrator decides the issue correctly, his award is to be executed and he is to be warned not to repeat this.

21. See Ibn Farḥūn, op.cit. Vol. I, pp. 55-56.

22. See Dardīr, ibid; Khirshī, ibid; Ibn Farḥūn, op.cit. Vol. I, p.56.

23. Ibid.

Part 2. 1.Execution of Judgements.

a. Execution in non-proprietory matters.

In non-proprietory claims - for example matrimonial causes - no problems of execution arise. Where, for example, a woman plaintiff sues for divorce and the court, after hearing the case, decides to grant a decree, all it does is to order the husband to pronounce the talāq divorce. If he refuses to do so, then apart from any punishment (ta'dīb)[24] the court may impose upon him, it shall itself pronounce the talāq on his behalf.[25]

b. Execution in proprietory matters.

Execution of the court's judgement and enforcement of its orders are matters that have been taken outside the competence of the Shari'a rules and are governed by the Area Courts (Civil Procedure) Rules. This does not, in its

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24. For contempt of court.

25. See Coulson, Succession, op.cit. p.20.

operation, necessarily go against any rules of the Shari'a, since (a) as we have noted above, execution of judgements, in the Shari'a theory, depends upon the political authority which may quite validly take it outside the jurisdiction of the courts,[26] and (b) the rules on execution are themselves not in conflict with the Shari'a practice and procedure. Indeed, the discussions on methods of execution in the texts are very scanty and the main methods are the sale of the defendant's property if he has any, especially if he is absent, and his imprisonment if he is known to be well-to-do and refuses to pay up. If he lacks the means to satisfy the judgement debt nothing can be done against him. Indeed, as shown above, it is considered unethical (harām) for a person to sue another well knowing that the other has no means to pay up (or to repay).[27]

The problem posed by the Shari'a rules is that a successful "judgement creditor" may not be able to find out whether the "judgement debtor" is or is not financially able to satisfy the judgement. In theory, the law presumes in

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26. See Chapter II, Part 2, above.

27. Mayyāra, op.cit., Vol. I, p. 25.

in respect of the judgement debtor, that he lacks the means - that he is poor. However, Ibn Hindī is quoted as saying that this rule has been modified (indeed, reversed) by practice because in practice judges came to require of the debtors to prove their impecuniousity.[28]

The Shari'a (and other "native") courts in Northern Nigeria use either imprisonment or the threat of imprisonment to intimidate a judgement debtor to pay up. This is quite often done wrongly and the High Court has had occasion to remind the Area Courts that execution of judgements is governed by the Area Courts (Civil Procedure) Rules.[29]

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28. See Chapter V, Part 1, above. This change of procedural rules does not necessarily help matters very much. The debtor can easily prove his lack of means (for example by the "exonerative oath") while the creditor cannot prove the contrary.

29. See Alhaji Umam Dantama v Iya Na Alhaji Bello Gusau, Case No. NWS/44A/71, February 1972. Most of the alkalis (Shari'a judges) whose views I asked about this case lamented that they had been deprived of the most effective means of enforcing their judgements. But Alhaji Jibir Daura (Deputy Grand Khadi) was of the view that the Area Courts (Civil Procedure) Rules are unimpeachable from the Shari'a point of view, and were quite adequate for practical purposes.

2. Execution under the Area Courts (Civil Procedure) Rules.

a. "Execution" by imprisonment of the judgement debtor.

The Rules provide that execution shall normally be delayed for fourteen days from the date of judgement, unless the court sees fit to make a special order for immediate execution.[30] The execution may be effected against the person by imprisonment provided that after due investigation the court is satisfied that the judgement debtor has means to satisfy the debt but refuses to do so, or that he has had means but disposed of his property in order to defeat his creditors.[31] Before the judgement debtor is committed to prison the creditor shall be ordered by the court first to pay a sum sufficient for the subsistence of the debtor while he is in prison.[32] The maximum period for which such a debtor may be committed is three months, and he shall be released any time before the period expires if the judgement is satisfied or if the creditor asks for his release.[33]

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30. Or. 17 r.2.

31. Or. 18, rr. 9,10.

32. Or. 18, r.8.

33. Or. 18, rr. 11, 12.

b. Execution against the "judgement debtor"s" property.

Imprisonment of the judgement debtor does not operate as satisfaction or extinguishment of the debt and does not deprive the creditor of his right of execution against the debtor's property.[34]

Execution against the debtor's property is enforced as follows : The creditor has to apply to the court for execution of his judgement by attachment and sale of the debtor's property. Upon such application the court issues a writ for the attachment and sale of the debtor's property, addressed to the bailiffs and messengers of the court.[35] These latter (upon receipt of the writ) may then seize any items of the debtor's movable property (save his household utensils, tools of trade and his bedding and clothes, to the value of ten pounds).[36] The goods so seized are then sold by auction as arranged by the clerk of the court under the direction and general supervision of the judge.[37] However, (a) five

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34. Or. 18, r. 13 (1).

35. Or. 19, r.2.

36. Or. 19, r.3.

37. Or. 19, r.4.

days must elapse after the seizure of the goods before the sale takes place unless they are perishables or the debtor himself requests the sale of the goods before that period. Such a request is to be made in writing or, if made orally, it has to be made by the debtor in open court before the judge "in the presence of not less than two witnesses". But (b) the court may direct that the sale shall be postponed for a period not exceeding twenty-eight days after the attachment.[38]

The proceeds of the sale are in the first instance paid into the court which after deducting the expenses of the sale pays out the creditor his due and returns the remainder, if any, to the debtor.[39] If, on the other hand, the sale of the movable property of the debtor does not satisfy the judgement, the creditor may again apply to the court for a writ to issue for the attachment and eventual sale of the immovable property of the debtor.[40] Such a writ is, again, addressed to the bailiffs and messengers of the court who, in this case, first serve the debtor with the written order of the

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38. Ibid.

39. Or. 19, r.6.

40. Ord. 19, r.7.

court (in a special form) forbidding him to alienate the property attached and also forbidding everybody else to accept such property, pending the judgement sale. Copies of the order are to be posted "on all items of the immovable property which have been attached".[41] Thereafter the property is to be sold by auction in the same manner as stated above.[42]

c. Execution by "Garnishee" proceedings.

These are proceedings to attach the debts owing to the judgement creditor from any third party - called the "garnishee" - for the satisfaction of the judgement debt. The procedure is as follows : the judgement creditor applies to the court for a "garnishee order" against the third party who owes the judgement debtor some money. The court has to be satisfied first that the judgement debt is still owing (or part of it is) and the amount involved; and that the garnishee is indebted to the judgement debtor. The judgement creditor

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41. Ord. 19, r.8.

42. Or. 19, r.9.

may be required to make a declaration (on oath if the court so requires) to the above effect.[43]

Where the court is satisfied of the above, it may make an order for the attachment of the debts owing to the judgement debtor and for the appearance of the garnishee before the court (on a specified date) "to show cause why he should not pay to the judgement creditor the debt due from him to the judgement debtor or so much thereof as may be sufficient to satisfy the judgement ... "[44] Such order is to be served both on the garnishee and the judgement debtor at least fourteen days before the day of hearing, and it binds the debt in the hands of the garnishee who may elect either to pay into court (the whole debt or such part of it as satisfies the judgement and thecosts) or to appear and dispute his own liability (to the judgement debtor).[45] If he pays up, that ends the matter, and also operates as a valid discharge to the garnishee against the judgement debtor to the tune of the amount so paid.[46] But if he disputes liability the court

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43. Or. 20, rr. 1, 2.

44. Or. 20, r. 3(1).

45. Or. 20, rr. 5, 7.

46. Or. 20, r.11.

has "to hear and determine the issue in such manner as justice shall seem to require".[47] If, on the other hand, he fails to pay up and also fails to appear on the "return day" to dispute his liability, the court may order execution against the garnishee.[48]

d. Interpleader proceedings.

In the course of the execution of a judgement against the judgement debtor, a third party may claim that the (movable or immovable) property attached in the name of the debtor, does not in fact belong to the debtor, but to that third party. Such a person has to apply to the court which issued the writ of attachment for the issue of a summons calling upon the judgement creditor to appear before the court on a specified date, "to show cause" why the property in question should not be released from the attachment.[49] The claim and the application for the interpleader summons must be made at the earliest opportunity. If the property has already been advertised

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47. Or. 20, r.7.

48. Or. 20, r.6.

49. Or. 21, r.1.

for the sale, the sale shall be postponed until the interpleader claim has been investigated.[50] The claim shall be supported by the claimant's declaration (on oath if the court so requires) specifying the property in respect of which the claim is made and the grounds upon which it is claimed.[51]

Part 3. Other Matters.

1. Hailūla - Sequestration and Prohibitory injunctions.

A plaintiff who claims some corporeal property, whether landed property or personal property in the possession of another[52] may wish to have the person who is in possession of the property to be ordered to stop exercising ownership rights over the property. The plaintiff may entertain fear that between the time of the commencement of litigation and the determination of the case, the property may be either

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50. Or. 21, r.3.

51. Or. 21, r.4.

52. Who may be the defendant in the case or a third party who derives his title or claim from the defendant.

alienated or otherwise adversely affected if it remains in the hands of the defendant (or the person in whose possession it is for the time being).

The plaintiff has the right, provided he has established a prima facie case, to request and the court is to grant the request of hailūla (i.e. sequestration of the property in dispute).[53] This is also called ʾiqāf[54] and the essence of it is to deprive the defendant-possessor of his possessory rights over the property pending the final outcome of the suit.

This is to be done by taking the property from his possession - for example by ordering him out of a house and locking it up, the court keeping the keys; or putting a shop under the management of a manager appointed by the court; or storing up chattels as the court directs.[55] If the property the subject of dispute is an income-earning property, for example a shop or a tenement house, the income is to be kept as the

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53. Ibn Farḥūn, op.cit. Vol. I, p.179; Dardīr, op.cit. pp. 189-190; Dhirshī, op.cit. pp. 204-205.

54. See Dardīr, ibid.

55. Ibn Farḥūn, ibid; Dardīr, op.cit. p.190; Khirshī, ibid.

court directs, pending the determination of the case.[56] In the case of perishable things, like fruits, they may only be kept in sequestration for a short period. If a longer period is necessary for the trial of the case, then the court is to order the sale of the things and the proceeds to be kept for the eventual winner of the case.[57]

However, the court must not grant an unduly long time to the plaintiff to prove his case while the property is under sequestration. Indeed, some authorities do not approve of sequestration at all. Instead, according to these authorities, if the plaintiff is unable to prove his claim - even though he has established a prima facie case - the defendant is simply to be ordered by the court not to alienate or transform the property until the determination of the case.[58] (This is rather similar to the "prohibitory injuctions" of English law under the Area Courts (Civil Procedure) Rules.[59])

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56. Ibid.

57. Ibid.

58. This is said to be the view of Ibn Qāsim among several others. See Dasūqī, op.cit. p.190. Ibn Farḥūn, ibid.

59. See the Area Courts (Civil Procedure) Rules, Order 15.

2. Time bar.

The Shari'a does not, as a general rule, recognize lapse of time as a defence to an action, whether the claim is based on contractual or delictual liability.[60] A suit instituted a long time after the cause of action had arisen may, of course, fail because of lack of the necessary evidence to prove the case, but not because of lapse of time per se.

However, in actions for the recovery of land or for the return of a chattel in the defendant's possession, lapse of time operates as a defence. This defence is based both on what we may call the "statutory" time bar[61] and on the rules of daʿawā above mentioned.[62] Under the former, in accordance with the Hadīth of the Prophet to the effect that whoever keeps a thing for a period of ten years becomes its owner, a plaintiff

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60. In a case of bodily injuries, for example, the plaintiff can sue any length of time after the injury had been caused.

61. I.e., the mere lapse of the required period of time. See the Mudawwana, op.cit. p.192; Dardīr, op.cit. p. 234; Khirshī, op.cit. p. 242.

62. See Chapter IV above.

who sues for the recovery of his property after that period, will lose the case. He will not even be allowed to introduce evidence of his title to the property. Under the rules of da'awā, a claim that is belied by 'urf is to be rejected by the court.[63]

However, the rules on the period after which a possession matures into ownership differ according to the nature of the property involved, and the relationship between the parties, as follows :

a. Dwelling houses and other immovable property.

Where the parties are total strangers to each other, possession for ten years[64] confers a title. Illustration : P sues D for the recovery of a house or a garden which P claims belongs to him and D denies the claim. Assuming that D is in no way related to P - either by blood, marriage or business partnership - P's claim will fail if the following are established : that :-

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63. Ibid. (Because it fails to satisfy one of the conditions of sihhā).

64. Ibn Farḥūn, op.cit. Vol. II, p. 94, things eight years are enough. The same period applies also for farms and gardens.

i. D has been in possession of the property for the previous ten years or more, andhe has dealt with the property as he pleased without any demur or protest by P.

ii. P has been throughout the period, in praesentis [66] actually or constructively (haqīqatan or hukman)[67] and has never protested against D's possession of or dealing with the property. However, if though the parties were inter praesentis during the period or part of the peiod, the plaintiff was either a minor or a safīh[68] during the whole or part of the period, his claim will not be defeated by this rule. Nor will the claim of a plaintiff who was absent during the whole or a part of the time.[69] Nor will a landlord's claim against tenants no matter how long they have been in possession.[70]

The rules are based on the Hadīth above mentioned, but they are also buttressed by 'urf.[71]

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66. Ibid.

67. Dasūqī, op.cit. p. 235.

68. Dasūqī, op.cit. p. 234; Dardīr, op.cit. p. 234; Khirshī, op.cit. p.242.

69. Ibid.

70. Dardīr, op.cit. p.235.

71. Dardīr, op.cit. p.234; Ibn Farhūn, op.cit. Vol. II, p.95. It is pointed out in these texts that it is contrary to general behaviour of people to forget about their property for such lengths of time.

b. Chattels

In claims for the return of chattels of any kind, the rules on real estate ((a) above) apply with the exception that the time after which possession matures into ownership is reduced to two years.[72]

c. Business Partnership.

Where the parties are business partners these rules apply subject to the additional requirement that the defendant in possession had not only been in possession for the ten (or two) year period, but had also engaged in major[73] acts of dealing with the property inconsistent with the plaintiff's claim of partnership, and the plaintiff had acquiesced in this.[74]

d. Blood and other relatives.

Where the parties are related to each other by blood or by marriage and they are also partners,[75] the above rules

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72. Dardīr, op.cit. p.236; Khirshī, op.cit. p.244; In the case of what we may call consumer non-durables, for example clothes, the period is one year. See Ibn Farḥūn, op.cit. Vol. II, p. 96.

73. Dardīr, op.cit. p.235, explains "Major" acts to mean such things as the cutting down of trees.

74. Dardīr, ibid; Ibn Farḥūn, op.cit. Vol. II, p.101; Khirshī, op.cit. p. 243.

75. For example in inheritance - Ibn Farḥūn, op.cit. Vol. II, p.99.

apply but (i) the period is extended to forty years, and (ii) no length of time in possession of the property of a parent (or a child how low soever) makes the possession mature into ownership.[76]

e. Waqf property

The above rules do not apply in claims concerning waqf property. No matter how long the defendant may have been in possession of any item of property, if it is claimed that it is a waqf endowment, the claim will be heard.[77]

3. Costs.

Costs incurred in the course of the proceedings are a matter governed by the Area Courts Rules.[78] Costs are defined in the Rules as :

> "expenses necessarily and actually incurred by a party on account of the proceedings in a court, and shall

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76. Dardīr, p.235; Khirshī, ibid; Ibn Farḥūn, ibid. Dasūqī, op.cit. p.236

77. Dardīr, ibid.

78. Area Courts (Civil Procedure) Rules, Order 16.

include the expenses of summoning and of the attendance of the parties and witnesses and the fees paid during the proceedings and for the enforcement of an order of the court." 79

Whether costs are awarded to the successful party or not (and how much) is left at the entire discretion of the court.[80] It is also up to the court how to assess the costs, whether summarily or by detailed examination of a claim for costs at the end of the trial.[81]

Costs are not an important part of litigation in the Area Courts in Northern Nigeria - for the simple reason that the expenses involved in litigation are very few and the amounts very small. The main costs are the various court fees and the fees for the service of process and the enforcement of judgements.[82] The costs of producing witnesses are hardly ever claimed - if only because the witnesses are most often local residents whose only expenses are the hours spent in the court.[83]

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79. Ibid, Or. 15, r.1.

80. Or. 15, r.2.

81. Or. 15, r.3.

82. Or. 25.

83. Which is (a) not a very easily quantifiable matter, and (b) both the Shari'a (see Chapter V Part 1 above) and popular feelings regard giving evidence as a community duty for which no fees may be charged even if the witness has suffered losss of time.

Under the Shari'a rules on costs, the only costs recognized are the fees for the process server. This, as has been shown above,[84] is primarily the responsibility of the Bait-el-māl (the public treasury). If no provision is made for bailiffs and messengers (in Northern Nigeria the Area Courts enactments have specifically made provisions for these officials) then the judge should bear their responsibility. If the judge is not sufficiently public spirited (or not wealthyenough) to do so, then it is the plaintiff who has to bear the burden. But he can claim reimbursement from the defendant if it is shown that the defendant is guilty of ladad - not otherwise.[85] Even in this there is a great deal of disagreement; some authorities say the defendant should only be responsible for what is claimed and proven against him and for nothing else.

The expenses incurred in bringing witnesses, as we have shown above, count as costs only if the witnesses have to make long journeys to attend the trial, not otherwise.[86]

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84. See Chapter III, above.

85. Ibid.

86. See Chapter V, Part 1, above.

4. Appeals.

As we have observed above, the Shari'a does not have a system of a hierarchy of courts. There may be several different courts or several different state officials with different judicial jurisdictions, and there may be a Chief Justice (the Qādil Qudāt), but appeals from a court of lower to a court of higher jurisdiction is not an established part of the Shari'a procedure.[87]

This does not mean, however, that the Shari'a forbids systems of appeals and a hierarchy of courts. In point of fact, the Shari'a does recognize reversal of the decisions of a court and retrials. A decision is reversible on grounds of error of law, although the trial judge may himself do this without the case necessarily going on appeal to another judge.

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87. Jung, op.cit. p.34, suggests that there did exist appellate courts in Muslim Spain, and that the "Court of the Kazi-ul-Kuzat (sic) was the Chief Appellate Court where appeals from the subordinate courts were filed." It may also be observed here that Mayyārā, op.cit. Vol.II, p. 30, mentions a case which came on appeal to Ibn Sirrāj (the Qādil-Jamāa of Granada) concerning an absentee defendant (ghā'ib). See Chapter III above.

A system of appeals may therefore be considered as more or less a matter of administrative organisation of justice.

Appeals from lower Area Courts.

The rules governing appeals are purely statutory, and are to be found in the Area Courts Edict and Rules and the High Court and the Shari'a Court of Appeal Laws.

As we have shown in Chapter I above, there are four grades of Area courts - Grades 1, 2 and 3 and the Upper Area Courts. Grades 1 - 3 are courts of first instance jurisdiction only and an appeal lies to the Upper Area Court initially and from there to either the High Court or the Shari'a Court of Appeal, depending on the subject matter of the case.

The Area Courts Edict provides that :

> "(a)ny party aggrieved by a decision or order of any area court grade I, II or III may appeal therefrom to the upper area court"

having territorial jurisdiction over the area in which the trial court is situated.[88]

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88. Area Couats Edict, s.53.

From the decision or order of an Upper Area Court, an aggrieved party may appeal either to the Shari'a Court of Appeal in matters of Muslim personal law, or to the High Court in all other cases.[89]

When a case goes on appeal, the appellate court - whether it is the Upper Area Court, the Shari'a Court of Appeal or the High Court - may re-hear the whole case and may hear any additional evidence it deems "necessary for the just disposal of the case".[90] It may confirm, reverse or vary the decision or order of the lower court, and it may also exercise any power that the lower court could have exercised in the case. It may also quash the proceedings altogether and order that the case be retried either in the lower court of first instance or any other court of competent jurisdiction.[91] Finally, the appellate court is required to "decide all matters according to substantial justice without undue regard to technicalities".[92] (One may be forgiven for wondering whether

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89. Ibid, s.54.

90. Ibid, s. 59(2).

91. Ibid, s. 59(1).

92. Ibid, s. 61.

the High Court in the Sokoto case of Daje Alkanci (above considered) had had its attention drawn to this provision of Section 61 of the Area Courts Edict.)

In cases which go to the Shari'a Court of Appeal the court is required

> "to administer, observe and enforce the observance of, the principles and provisions of the Moslem law of the Maliki school as customarily interpreted at the place where the trial at first instance took place ... " 93

Cases which go to the High Court on appeal from Area courts are heard, as explained above, by a bench of three judges - two High Court judges and one Shari'a Court of Appeal judge.[94] Where the subject matter of the appeal is governed by Shari'a law - for example contract cases among Moslem litigants - the court would be presided over by the judge of the Shari'a Court of Appeal. This is because the High Court Law provides that one of the three members of the court constituted as above "who is considered by a majority" of the members of the court

> "to have the greatest knowledge of the law to be administered in a particular appeal shall preside at the hearing of such appeal." 95.

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93. Shari'a Court of Appeal Law, s.14.

94. High Court Law, s.63(1).

95. Ibid, s. 63(2).

This rather salutory provision makes it possible for cases governed by the Shari'a law to be dealt with on appeal, as at first instance, by people learned in the Shari'a. But for this provision, cases governed by the Shari'a could easily end up on appeal in the hands of judges who may need expert evidence on the Shari'a. And it is perhaps in order to avoid such a consequence that this provision was incorporated in the High Court Law.

Conclusion.

The present day Northern States Shari'a Court of Appeal, whose function is purely the judicial one of hearing appeals, has been, it is submitted, unduly confined within narrow limits. It is the final appellate tribunal in cases of Moslem law of personal status coming from the Area Courts in all the six states of Northern Nigeria.[96] The Grand Khadi and the other judges of the Shari'a Court of Appeal are required to be people of a great deal of learning in

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96. See Chapter I above.

the Shari'a[97] and with a vast deal of judicial experience. The present incumbents,at least the Grand Khadi and his Deputies, are famous throughout Northern Nigeria for their learning and their contribution to learning by way of their various legal and theological publications. One would have expected, therefore, that the Shari'a Court of Appeal Law would have empowered the Grand Khadi to exercise a certain amount of control and, from time to time, to give some general guidance, over the administration of the Shari'a by the Area Courts. This could be done, for example, by enabling him to issue Judicial Circulars from time to time[98] with the view to ensuring a certain amount of uniformity in the administration of the law. To that end, also, he should have been empowered to convene periodic meetings and conferences of the Alkalis of Area Courts in order to discuss matters concerning the imporovement of the administration of the law and other matters

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97. To qualify for appointment as a Judge of the Shari'a Court of Appeal, a candidate must be thirty-five years of age or over, and must be a Moslem. He must, in addition, have had either ten years' experience in a judicial capacity or have completed a course of study in the Shari'a at a University or School "approved by the Governor" - see the Shari'a Court of Appeal Law, Laws of Northern Nigeria, 1963, s.5.

98. As, I understand, is the practice in the Sudan.

of current interest, for example matters that call for re-examination and reform of any branch of the law and practice.

The Shari'a Court of Appeal has at the present time no such powers.

CHAPTER VII

CONCLUSION

In the preceeding pages an attempt has been made to study some of the relevant aspects of the Islamic law of civil procedure as interpreted by the Mālikī School and the application of this law in those native courts in Northern Nigeria in which the Shari'a law of procedure is applied as being the native law and custom of the courts.

All native courts in Northern Nigeria (now called "Area Courts") are governed in matters of civil procedure by the Area Courts (Civil Procedure) Rules, 1971,[1] made by the Chief Justice. These rules derive their inspiration from English law but they make substantial concessions to native law and custom generally, and to Islamic law in particular. In some aspects of procedure the Rules provide that native law procedure (for our purposes this means Islamic law) is to apply. In other aspects, the Rules are to be superseded by native law if they are in conflict with it; and, most important for our purposes, Islamic law is specifically

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1. And the enactments replaced by the 1971 Rules.

required to govern matters of trial procedure in what has now been termed by the Area Courts Edict "Moslem cases." The effect of these provisions is to enable those native courts which are in the Moslem areas to continue in their age-long practice of Shari'a procedure. This has been further facilitated by the fact that (as, I hope, the thesis has shown) the provisions of the Rules governing those other matters of civil procedure which have been legislated out of the ambit of the Shari'a, are in substantial conformity with the rules of the Shari'a.

The Shari'a rules which govern trial procedure are characterised by formalities. These formalities would not necessarily lead to unjust results if the courts had at their disposal the other supporting institutions of the Shari'a procedure - the udūl and the muzakkīs. Indeed, even with these , it has been suggested that the

> "emphasis of the Islamic law of procedure lies not so much on arriving at the truth as on applying certain formal rules". 2

But in the absence of these institutions, the full application of the strict rules would only make a travesty of justice and

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2. See Schacht, Introduction to Islamic Law, op.cit. p. 195.

make the course of litigation appear to be

> "an obstacle race in which Rules of Court provide the traps and pitfalls, the ditches to be jumped, the walls and fences to be scaled, the hurdles to be surmounted." 3

This, of course, is certainly not the aim of the law. All the available internal evidence shows that the later authorities did realise the need for the judge to play a more active role in order to reduce, if not to eliminate, the chances of the rules playing into the hands of, and being used by, the unscrupulous to defeat the ends of justice. The only question - which should engage the attention of the administrators of law today - is how to "amend" the rules in order to make them serve the needs of present-day litigants and litigation.

I should like to suggest that it is perfectly feasible to do this without going outside the Shari'a law. One possible solution has been suggested in Chapter V.

But even if a Code of Civil Procedure to govern all Area Courts, Shari'a and non-Shari'a courts alike, were required to be drafted from an amalgam of the present "Rules" and the

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3. See Master Jacobs : The Rules of the Supreme (Revision) 1965, Queen's Bench Practice. (A lecture delivered in the Middle Temple Hall, March 23rd, 1966, and subsequently published as a pamphlet). London, 1966.

Shari'a rules, this could be easily done. And such a Code, which need only differ from the present "Rules" in minor details, would satisfy both the Shari'a and the needs of modern litigation.

Finally, I should like to suggest that in order to obtain high and uniform standards of administration of justice throughout the Area Courts branch of the judiciary, it is desirable to have such a uniform Code of Civil Procedure which all Area Courts are to be bound to apply.

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GLOSSARY OF SOME OF THE ARABIC TERMS AS USED IN THE TEXT

Terms fully explained in the text of the thesis are not reproduced in the Glossary

adl	trustworthy person; competent witness (plural = udūl).
alkali	Hausa for judge. Derived from the Arabic al qāḍī
al walad lil firash - "the child belongs to the marriage bed"	
amāna	trust
amīn	trusted; trustworthy person
amthāl	just - average - fair-minded people. (From mithl - average, fair).
aql	sagacity.
arkān	essential elements. (This is the plural form of the word rukn).
āwān	assistants; court orderlies; baliffs. (This is the plural form of the word awn).
awqāf	pious endowments which, under Islamic law, may be made in favour of the members of the endower's faimly. (This is the plural form of the word waqf)
ayn	the corpus, the substance of a thing; the thing itself.
bay'a	oath of allegiance.
bulūgh	coming of age; majority. (Bāligh is the person who has attained majority, i.e. an adult.)

ḍarar	necessity (as a dispensing element); prejudice. (in matrimonial matters it means cruelty as a ground for divorce available to the woman).
Dār-el-Islām	the territory of the Islamic state
farḍ	duty; compulsory duty.
farḍ ayn	compulsory duty imposed by the Shari'a on the individual.
farḍ kifāya	compulsory duty imposed by the Shari'a on the community generally, which falls when performed by any member of the community
fāsiq	a sinner. Also opposite of adl.
fatwā	the considered legal opinion of a jurist. A responsa.
fuqahā	jurists. (This is the plural form of faqih.)
ghā'ib	absent; absentee.
ghulām	a court orderly or attendant.
hadd	statutory punishment fixed by the Qur'an or the Sunna. (Hudūd is the plural form of hadd.)
hāḍir	being present; in praesentes. Opposite of ghā'ib.
ḥajr	interdiction
hāl	see istiṣḥāb-al-hāl.
harām	forbidden by the Shari'a
hiba	gift

idda — the waiting period imposed by the Shari'a on a divorced or widowed woman before she can re-marry

ijāra — fee

ijbār — matrimonial constraint. The power of a "marriage guardian" to compel his ward to marry a person approved by the guardian. This power belongs primarily to the father (of a woman who has never been married before) who can delegate it to an appointed "marriage guardian".

ijtihād — (lit. striving; exertion). The ability to extract legal rules by the exercise of independent reasoning. (mujtahid - the person who qualifies to use ijtihād.)

ilm — knowledge

Imām — ruler; head of state; head of one of the Schools.

iqrār — admission. (muqir - the person who makes the admission.)

istiṣḥāb — the doctrine of continuance. (Istiṣḥāb-al-ḥāl' — continuance of the last known state)

iwad — consideration

Izār — giving a litigant an opportunity to raise objections.

jāhil — an ignorant person.

Jarā'im — jurisdiction - criminal jurisdiction covering lesser offences other than hudūd. (Walil jarā'im is the official in charge of this jurisdiction.)

kamāla — the quality of being suitable; being complete.

khilwa — ("retirement"); privacy between busband and wife which gives rise to the presumption that their marriage has been consummated.

khul' — divorce by mutual consent for a consideration from the woman.

mafqūd — a missing person who is not known to be either alive or dead.

mahr — see sadāq

mashhūr — the dominant view

mashwara — consultation. Also sometimes shāwara

maṣlaḥa — public interest

Mazālim jurisdiction - jurisdiction dealing with complaints. (Walil mazālim is the official in charge of this jurisdiction, called the "Inspector of torts" by some authors and "the Master of Complaints" by others.)

mujtahid — see iǰtihād

muqallid — see taqlīd

nafaqa — maintenance for a wife

nā'ib — delegate, representative.

nasaba — blood relationship.

nāzir — (in waqf) the administrator of the waqf endowment, the superintendent.

qabd — taking possession.

qasāma — oath (similar to compurgation) sworn by accusers in order to impose liability on an accused person in lieu of evidence against him.

qiyās — the doctrine of analogy.

radd — "return" (of oath).

radd-al-yanūn — (lit. "return of the oath"). Asking the other party in litigation (who is not primarily obliged to swear) to swear and obtain judgement.

rahm — (kindred) blood relations.

rij'a — ("recall" or "return"). The recall of a divorced wife by the husband in cases of revocable divorce.

rukn — see arkān.

sadāq — the nuptial gift. The "bride price" which a groom must pay (or agree to pay) to the bride. This is one of the conditions imposed by the Shari'a which the parties cannot dispense with. (Mahr is a more generally used term for this, but sadāq is the term preferred in Northern Nigeria.)

sahih — valid; proper. (sihha - validity).

shahāda — evidence by witnesses; (shuhūd - witnesses).

Shari'a — the general body of Islamic law governing all matters, religious and temporal.

sharṭ — condition (shurūṭ - plural of sharṭ).

shāwara — see mashwara.

shurṭa — police

sigha — the mode (of concluding an agreement); modalities.

Sunna — the precedent, (practice) of the Prophet.

tadlīs — fraud. (Apparently derived from the Latin word dolus).

taflīs — bankruptcy.

tagafful — absent-mindedness.

tahammul — ("carrying"). Observing or witnessing an event in order to be able to testify about it if requested to do so.

talāq — a divorce unilaterally pronounced by the husband. Under the Shari'a the husband has unfettered power to divorce his wife whenever he pleases, by talāq.

tamyīz — discernment.

taqlīd — reliance on the teachings and the interpretation of the Shari'a of one of the Masters. (Muqallid is a person who relies on such teachings and interpretation and has not the power to expound the law by his own ijtihād.)

udūl — see adl.

ummul walad — a female slave who has born a child to her owner and is thereby entitled to be free on his death.

Usūl — the sources of the Shari'a.

uyub — defects (ayb is the singular).

wājib — obligatory, compulsory.

wakīl — agent, representative. (wakāla - agency, representation).

walī — guardian.

waqf — see awqāf.

waṣiyya	bequest; a will. (waṣī-guardian - a guardian appointed under the will of the appointer.) (mūṣī - the testator)
ẓāhir	obvious
zimma	conscience; credit.
zina	the offence of sexual intercourse outside the bonds of marriage

CASES